Big Three Industrial Gas & Equipment Co. ***and*** **Oil Chemical and Atomic Workers International Union, AFL-CIO.** Case 23-CA-6190

September 20, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On June 23, 1977, the National Labor Relations Board issued its Decision and Order in the above-entitled proceeding,[1] directing Respondent, *inter alia*, to make whole 34 employees for losses resulting from their discharges by Respondent in violation of Section 8(a)(3) and (1) of the National Labor Relations Act, as amended. Thereafter, the Board's Order was enforced by the United States Court of Appeals for the Fifth Circuit.[2]

A dispute having arisen over the amount of backpay due the discriminatees and pursuant to a backpay specification and appropriate notice issued by the Regional Director for Region 23, a hearing was thereafter held before Administrative Law Judge Timothy D. Nelson for the purpose of determining the amount of backpay due the discriminatees. On November 18, 1980, the Administrative Law Judge issued the attached Supplemental Decision. Thereafter, Respondent filed exceptions and supporting argument and the General Counsel filed exceptions and a supporting brief.

The Board has considered the record and the attached Supplemental Decision in light of the exceptions, argument, and brief, and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order, except as modified below.

In his Supplemental Decision, the Administrative Law Judge recommended that discriminatee Jeffrey D. Stevenson not receive the backpay sought for him by the General Counsel because Stevenson did not disclose substantial interim earnings he had received during a portion of the backpay period until counsel for Respondent questioned him about those earnings on the witness stand during the backpay hearing. The Administrative Law Judge found that Stevenson's failure to report this interim income was not due to his "forgetfulness," but that his report of this additional interim income was provided only in the face of possible perjury charges. Addressing the Board's recent decision in *Flite Chief*,[4] not to penalize a discriminatee who waited until the "11th hour" just before hearing before providing all relevant earnings information, the Administrative Law Judge reasoned that, unlike the discriminatee in *Flite Chief*, Stevenson had not "voluntarily" disclosed his interim earnings. Thus, the Administrative Law Judge determined that Stevenson should suffer a "penalty" for not revealing some of his interim earnings to the Board and that the penalty should be the one recommended by the Administrative Law Judge in *Flite Chief*; i.e., denial of backpay from the date the discriminatee was first employed by the interim employer from whom the nondisclosed earnings were received, until the interim earnings were revealed. In the instant case, according to the Administrative Law Judge, the recommended penalty would operate to bar backpay to Stevenson from July 25, 1977, until January 30, 1980,[5] thereby reducing Stevenson's award to $5,360; absent such a penalty Stevenson's backpay entitlement would exceed $17,000. The General Counsel argues that the penalty imposed on Stevenson is unwarranted in this case because the concept of a penalty in the instant circumstance has no place in the national labor law scheme. The General Counsel also contends that this case is unlike those involving fraud or deceit by a discriminatee which results in the Board's inability to determine from the record the actual amount of backpay owed. We find merit in the General Counsel's position.

We agree with the Administrative Law Judge's preliminary observation that it is regrettable that not all interim employment can be readily gathered from some discriminatees. However, the cases are rare in which discriminatees have attempted to defraud or abuse the compliance procedure.[6] And in

[1] 230 NLRB 392.

[2] 579 F.2d 304 (1978).

[3] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

In agreeing with the Administrative Law Judge that Floyd G. Williams acted reasonably and did not willfully refuse to maintain interim employment in honoring a business agent's request that, as a traveler, he leave the Evansville, Indiana, construction job at which he was working, we do not rely on the Administrative Law Judge's discussion of Sec. 8(f)(4) agreements and practices with respect to travelers. Cf. *Sachs Electric Company*, 248 NLRB 669 (1980).

[4] *Flite Chief, Inc.; Richard Miller and Karen Miller; M & M Truckadero Coffee Shop, Inc., James Miller and Paul A. Minder*, 246 NLRB 407 (1979), enforcement denied in part 640 F.2d 989 (9th Cir. 1981).

[5] Actually, Respondent unconditionally offered Stevenson reinstatement in April 1979, and backpay would therefore be tolled in any event from that time. The Administrative Law Judge's calculations, in fact, take that date into account.

[6] See, e.g., *Jack C. Robinson, doing business as Robinson Freight Lines*, 129 NLRB 1040, 1041-43 (1960); *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605, 614-618 (1964); *Great Plains Beef Company*, 255 NLRB 1410 (1981). See also the discussion of *Remington Rand, Inc.*, 13 LRRM 2565 (Board denied backpay to discriminatee who willfully concealed earnings

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structuring its remedial orders, the Board must be mindful of the purposes of the Act. The Board has stated that:

> The remedy of reinstatement and backpay is not a private right, but a public right granted to vindicate the law against one who has broken it. Its object is to discourage discharges of employees contrary to the statute and thereby vindicate the policies of the National Labor Relations Act. The statute authorizes reparation orders, not in the interest of the employees, but in the interest of the public. They are not private rewards operating by way of penalty or of damages.[7]

In *Flite Chief, supra*, the Board expressed its concern about discriminatees fraudulently or deceitfully concealing offset earnings, but indicated its reluctance to penalize discriminatees whose interim earnings can be determined and who have borne the burden of a respondent's illegal conduct.[8] The court in *Flite Chief*, while denying enforcement of the Board's order on this issue, stated that the key issue was whether the backpay remedy effectuated the policies of the Act, a principle with which, as noted above, we fully agree. Indeed, in *Phelps Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 198 (1941), cited by the Court of Appeals on this topic, the Supreme Court affirmatively noted that the Board itself has not mechanically applied its backpay remedies, but has striven "to attain just results in diverse, complicated situations," to effectuate the purposes of the Act. However, the court in *Flite Chief* also emphasized the language of Section 10(c) of the Act that the Board was "to take such affirmative action, including reinstatement of employees *with* or *without backpay*, as will effectuate the policies of the Act." (640 F.2d at 992, emphasis supplied by the court.) But the Supreme Court has stated that the "make whole" aspects of the remedial orders are of paramount importance. See, generally, *Virginia Electric Power Co.* v. *N.L.R.B.*, 319 U.S. 533 (1943). And in our view, by using the phrase "with or without backpay," in Section 10 Congress may simply have been assuring that the Board would provide only such remedy as would make the discriminatee "whole." Thus, the construction that the court in *Flite Chief* gave to this language is not the *only* construction possible nor, given the thrust of Section 10(c) as a whole, is it the most likely.

Thus, in remedying unfair labor practices, the Board is concerned with public rights, detering future violations, and making whole individual discriminatees. As noted, the import of Board and court decisions is that the purpose and policy of the Act is remedial, not punitive, in nature. In instances where a question has arisen over the entitlement to and the extent of backpay the Board has sought to discharge its public obligations, not by condoning the failure of discriminatees to inform the Board fully of all interim earnings, but by recognizing that such accurate reporting is not always possible. Even in situations where all interim earnings are not reported to the Board's Regional Office, no fraud or deceit on the Board or public is deemed to have been committed so long as the Board can determine with accuracy the backpay owed a discriminatee.[9]

In the instant case, it is Respondent, and not the discriminatee Stevenson, who has been adjudged the wrongdoer. At this juncture, we are attempting as nearly as possible to make the discriminatee whole. Indeed, were we to do otherwise, we would be rewarding Respondent by allowing it to avoid, at least in part, the consequences of its unlawful conduct.[10]

Furthermore, we think that there are other considerations which weigh against adopting the Administrative Law Judge's approach in evaluating the circumstances here. Thus, it is not unusual for the period covered by a backpay specification to stretch over many months or even years. Nor is it unusual to find a discriminatee who has held a substantial number of jobs, some of short duration, or who has relocated several times in an effort to find work during the backpay period. Given such circumstances, one should hardly be surprised if a dis-

so as to increase his amount of backpay; discriminatee had obtained new name and new social security number and had failed to report earnings under that name to the Board); and *Wilson & Co., Inc.*, 11 LRRM 2545 (1942) (actual falsification of records). Cf. *T. A. O'Donnell, doing business as O'Donnell's Sea Grill*, 55 NLRB 828 (1944).

[7] *Clayton E. Smith and Willard Smith d/b/a Clayton-Willard Sales*, 126 NLRB 1325, 1326-27 (1960). See also *Truck Drivers, Oil Drivers, Filling Station and Platform Workers' Union Local No. 705, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Randolph Paper Company)*, 227 NLRB 694 (1977); *Federated Publications, Inc. d/b/a The State Journal*, 238 NLRB 388 (1978); *Florida Medical Center, Inc. d/b/a Lauderdale Lakes General Hospital*, 239 NLRB 895 (1978); *Community Medical Services of Clearfield, Inc., d/b/a Clear Haven Nursing Home*, 236 NLRB 853 (1978).

[8] Of course, the burden is on an employer, in the first instance, to prove that a discriminatee has willfully incurred loss of earnings, and any uncertainty in the evidence is to be resolved against the respondent as the wrongdoer. *Aircraft and Helicopter Leasing and Sales, Inc.*, 227 NLRB 644, 646 (1976), and cases cited therein; *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569 (5th Cir. 1966). See also *Clayton-Willard Sales, supra*.

[9] See *Patrick F. Izzi, d/b/a Pat Izzi Trucking Company*, 162 NLRB 242, 244-245 (1966); *Arduini Manufacturing Corp.*, 162 NLRB 972, 973-976 (1967); *American Medical Insurance Company, Inc.*, 235 NLRB 1417, 1420-21 (1978).

[10] With all due respect for the view of the Ninth Circuit expressed in *Flite Chief*, even if the discriminatee is to be punished by withholding a part of his backpay, that is no reason to provide a windfall for a respondent. Indeed logic, equity, and the policy of the statute require that a respondent in such circumstances be ordered to pay an amount equivalent to backpay to the Treasury.

criminatee kept less-than-perfect records and, perhaps through inadvertence, failed to report interim earnings from one or two jobs.[11] In these circumstances, we think it particularly difficult to require an administrative law judge to speculate about the discriminatee's motive—i.e., did the omission result from a deceitful intent or rather was it the result of inadvertent error, poor recordkeeping, or the like.[12] In sum, we are reluctant to require administrative law judges to embark upon such a speculative course. Instead, recognizing both the pressures faced by discriminatees—pressures which after all are the result of a respondent's unlawful conduct—and the overriding remedial purpose of the statute, we prefer in this situation to resolve the matter by making the discriminatee whole in accordance with the corrected specification.[13]

Accordingly, we shall award Stevenson full backpay as set forth in the Administrative Law Judge's "Alternative Computation (Without Penalty)."[14]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Big Three Industrial Gas & Equipment Co., Houston, Texas, its officers, agents, successors, and assigns, shall pay to the employees involved in this proceeding as net backpay the amounts set forth opposite their names in the said recommended Order of the Administrative Law Judge, except that Jeffrey D. Stevenson shall be paid the amount set forth below:

Jeffrey D. Stevenson	$17,066

MEMBER ZIMMERMAN, concurring in part and dissenting in part:

While I join my colleagues in all other respects, I disagree that discriminatee Jeffrey D. Stevenson should be awarded full backpay. Stressing the overriding remedial purpose of the statute, my colleagues characterize the Administrative Law Judge's denial of full backpay as a "penalty," and conclude that the only way to protect the "public right granted to vindicate the law against one who has broken it" is to make Stevenson whole regardless of the Administrative Law Judge's unequivocal finding that Stevenson regularly lied and/or evaded questions and deliberately sought to conceal his interim earnings. They note that it is not unusual for the period covered by a backpay specification to span many months, that discriminatees, therefore, "perhaps through inadvertence," fail to report interim earnings from one or two jobs, and that it is unwise to require an administrative law judge to speculate whether a discriminatee's motive was the result of "deceitful intent or rather . . . the result of inadvertent error, poor recordkeeping or the like." These may be laudable considerations, but they do not apply to the facts in this case. Here, the Administrative Law Judge recognized that most discriminatees do not intentionally conceal interim earnings but through honest forgetfulness fail to report some of their earnings. (See fn. 85 of his Decision.) The Administrative Law Judge clearly distinguished Stevenson from this category of discriminatees by finding him not to be a credible witness on the basis of his demeanor, of his evasive and changing testimony, and the impeachment of his earlier false statements. This was not speculation. Rather, the inference was properly drawn that Stevenson was waiting to determine what Respondent knew before he revealed his earnings.

In these circumstances, withholding of full backpay cannot be considered a "penalty" beyond the Board's power to impose. As the Ninth Circuit stated in *N.L.R.B.* v. *Flite Chief*, 640 F.2d 989, 992 (1981):

[11] In the instant case Stevenson failed to report interim earnings for quarters in late 1977 and early 1978 but reported earnings for all other times of the backpay period.

[12] Indeed, Stevenson was never questioned at the hearing about his failure to report earnings for several quarters.

[13] While we respectfully disagree with the court's opinion in *Flite Chief*, we note that the penalty there corresponds closely to the dates of concealment of interim earnings. Stevenson's situation is quite different from that of the discriminatee in *Flite Chief*. The penalty suffered by the discriminatee there was denial of backpay from the time he did not report his hidden interim earnings until he did so at the hearing. But this operated to deprive him of backpay in almost precisely those quarters in which he actually concealed his earnings. Although not described in this manner, the penalty imposed by the court and the Administrative Law Judge in *Flite Chief* virtually coincided with the alleged concealment: no backpay in those quarters where earnings were concealed. By contrast, here, Stevenson did not report some earnings during the middle of the backpay period, but reported substantial earnings at the beginning and end of the period. Thus, to deny Stevenson backpay *in toto* from the date interim earnings which he failed to report commenced until he finally revealed them would penalize Stevenson to a far greater degree than the discriminatee in *Flite Chief* was penalized. We do not believe such a result should obtain here.

In his partial dissent Member Zimmerman suggests that by withholding a full backpay remedy here we better effectuate the purpose of the Act. Although we recognize, as does our colleague, that reasonable men may differ over the proper resolution of the problem we address here, we are convinced that on balance the purposes of the Act and hence the public interest is best served by ordering backpay in the full amount of the discriminatees' *actual* entitlement. For, no matter how our colleague attempts to characterize the partial remedy he would grant, the impact of such a remedy is to provide a windfall for the only party who has been found to have violated our statute. And, although we share our colleague's concern about any witness who knowingly misleads us, there are other avenues of redress available for such conduct.

[14] The Administrative Law Judge, recognizing that we might disagree with his exactment of a penalty on Stevenson, also calculated Stevenson's backpay without a penalty. We agree that this calculation is the proper measure of Respondent's backpay obligation.

> Calling it [denial of full backpay] a penalty, or a remedy, or a diminution, or a set-off, or an abatement is not the test. The test is, does it effectuate the policies of the Act.

I find that denial of full backpay in this case effectuates the policies of the Act. Two considerations are at issue here: the remedy of Respondent's unfair labor practices and the administration of Board compliance proceedings consistent with the public interest. While it is important that Respondent not be allowed to avoid the consequences of its unlawful conduct, it is equally important, as the *Flite Chief* court found, that a discriminatee not be rewarded "for his perfidy as opposed to discouraging such claimants from perverting an order issued in their and the public interest into a scheme for unjustifiable personal gain." (640 F.2d at 993.)

Thus, for the reasons set forth by the Ninth Circuit in *Flite Chief*, I would deny Stevenson full backpay. In so doing, however, I would not adopt the Administrative Law Judge's recommendation that backpay be cut off from July 25, 1977 (the date of Stevenson's first concealed interim earnings), to January 30, 1980 (the date on which he finally admitted his interim employment), because this fails to remedy sufficiently Respondent's unlawful conduct. Inasmuch as the Board's backpay remedy is computed on the basis of calendar quarters,[15] I would compute Stevenson's backpay award by withholding backpay for each calendar quarter in which concealment of employment occurred. Computing the backpay remedy in this manner accomplishes the dual purpose of discouraging Respondent from committing future unfair labor practices and discouraging discriminatees from abusing the backpay process for their own personal gain.

[15] *F. W. Woolworth Company*, 90 NLRB 289 (1950).

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

TIMOTHY D. NELSON, Administrative Law Judge: I am called upon to decide in this case the proper amount of backpay, exclusive of interest, owed by Big Three Industrial Gas & Equipment Co. (Respondent) to 33 (see fn. 15, *infra*) of its employees who were found by the National Labor Relations Board (the Board) to have been wrongfully discriminated against on August 25, 1976, when Respondent discharged them *en masse* and subcontracted to Brown & Root, Inc., its plant maintenance work which the 33 employees had formerly performed.[1] The pertinent background is as follows:

Following entry of its decision on the merits on June 23, 1977, the Board sought enforcement of its remedial order in the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit enforced said order on August 24, 1978.[2]

A controversy later arose between the parties as to the appropriate amount of backpay owed to each discriminatee. Accordingly, on October 24, 1979, the Board's General Counsel, through the Regional Director for Region 23, issued a backpay specification and notice of hearing in which was set forth on a quarterly basis the gross amounts allegedly owed by Respondent to each discriminatee, the amounts of each discriminatee's quarterly interim earnings known to the Regional Director, the resulting net backpay in each case, and the formulas and premises on which the backpay calculations were made. This pleading comprised over 100 pages.

On October 31, 1979, the Regional Director received an undated pleading captioned "Respondent's Answer" which consisted of six pages and amounted to a general denial. On November 8, 1979, the General Counsel filed with the Deputy Chief Administrative Law Judge a motion to strike the aforementioned answer because of its failure, as required by Section 102.54 of the Board's Rules and Regulations, to be sworn to by a responsible agent of Respondent and because of the absence of any affirmative averrals of premises, formulas, and specific alternative calculations of backpay amounts.

While ruling on the General Counsel's motion to strike was pending, Respondent filed on December 18, 1979, an amended and supplemental answer and opposition to motion to strike consisting of more specific pleadings, affirmative averrals, and alternative backpay calculations. When the General Counsel did not file further position statements, the motion to strike was denied by the Administrative Law Judge William J. Pannier III on January 8, 1980, "in light of the amended and supplemental answer."

Between January 9 and 29, 1980, Respondent filed additional supplemental answers, numbered 2 through 4, containing more specific defenses and averrals as to certain of the discriminatees.

Shortly before the hearing, the General Counsel issued an amendment to backpay specification based on more recently obtained information about interim earnings received by five of the discriminatees. This amendment had the effect of reducing the amounts claimed as net backpay for each of those discriminatees.

I heard the matter in hearing in Houston, Texas, on January 29-31, 1980, pursuant to notice contained in the original backpay specification and notice of hearing. At the joint request of the parties, I held the record open until April 18, 1980, to receive the deposition of dis-

[1] *Big Three Industrial Gas & Equipment Co.*, 230 NLRB 392 (1977). In addition to the unlawful mass layoff, the Board found that Respondent independently violated Sec. 8(a)(3) and (1) of the National Labor Relations Act (the Act) by discriminatorily suspending two employees, Coryell and Fairless, for 3 days shortly before the mass discharge. *Ibid.*

[2] *N.L.R.B.* v. *Big Three Industrial Gas & Equipment Co.*, 579 F.2d 304 (1978).

criminatee Thomas Hurt who was unavailable to the parties during the January hearing session.[3]

All parties appeared through counsel or other representative and were given full opportunity to introduce evidence, to examine witnesses, and to submit post-trial briefs. Timely briefs were filed with me by counsel for the General Counsel and counsel for Respondent. I have given them careful consideration.

I. THE ISSUES

Many of the questions to be resolved relate to the broad issue whether or not individual discriminatees satisfied their duty to mitigate Respondent's gross backpay liability in the roughly 2-1/2 years which elapsed between their unlawful discharges and the point at which Respondent concededly tolled the bulk of that liability[4] by offering each discrminatee reinstatement to his former job.

The particular questions involved in this area are identified in the case-by-case findings and conclusions set forth hereafter. At this stage, I will simply allude to some of the contentions raised by Respondent for purposes of illustration of the variety of issues involved. As to some discriminatees, it is contended that they chose to leave the "hot" Houston area job market, where high paying, regular positions—especially in the petrochemical industry—were so abundant as to render unreasonable their choices to seek or take work anywhere else on the globe. As to others, it is contended that they set their sights either too high or too low and that, accordingly, Respondent should not be required to make them whole for periods when they failed to earn wages comparable to those they were receiving in Respondent's operation before their unlawful discharges. As to others, it is contended that they simply abandoned any serious search for work. As to one other, it is maintained that offsetting interim earnings were fraudulently concealed, thereby invalidating the net backpay figures claimed by the General Counsel for him. It should be added that more than one of the above defensive contentions are raised as to certain backpay claimants.

Apart from these case-by-case questions related to the broad "duty to mitigate" issue, Respondent makes a limited number of frontal assaults on the General Counsel's overall formulaic approach to determining the gross backpay for each individual. While a background discussion will be necessary for a fuller understanding, Respondent's main contentions here may be summarized as follows:

1. The General Counsel wrongfully used the hours worked at Respondent's plant by employees of the subcontractor (Brown & Root) in the 2-1/2-year backpay period as the measure of the hours which would have been worked by the discriminatees had they not been unlawfully discharged. Instead, Respondent maintains, the hours worked and earnings received during that period by two employees of Respondent, Kalmas and Cook, should have been the proper yardstick.

2. The General Counsel should not have used the formula originally established in *F. W. Woolworth Company*, 90 NLRB 289 (1950), whereby net backpay is calculated on a quarterly basis; and, instead, should have used the gross interim earnings received by the discriminatees during the entire backpay period as an offset to the gross backpay due them for the same period.

II. CONCLUSIONS AS TO RESPONDENT'S BROAD DEFENSE

I deal first with these latter attacks by Respondent inasmuch as they are of general and fundamental significance to the validity of the backpay specification.

A. *Attack on the Woolworth Formula*

In *F. W. Woolworth Company, supra*, 90 NLRB 289 (1950), the Board first adopted the "quarterly" approach to the computation of backpay due to unlawfully terminated employees. For reasons articulated therein, the Board directed that a discriminatee's interim earnings "in one particular quarter shall have no effect on backpay liability for any other quarter." 90 NLRB at 292–293. In *Seven-Up Bottling*,[5] the Supreme Court sustained this approach to backpay calculations. Thirty years have since passed without any material changes in this area of backpay law.

Respondent argues that times have changed and, along the way, "national priorities have changed from combatting deflation to combatting inflation." It is suggested that the *Woolworth* approach represents "inflation at its worst" and that it is further "punitive . . . and unwarranted."[6]

Apart from its invocation of the argument that national concerns about inflation require a reexamination of the *Woolworth* approach, the balance of Respondent's arguments are familiar and were fully disposed of by the Court in *Seven-Up, supra*. Assuming, *arguendo*, that the *Woolworth* approach may in some instances had an identifiable inflationary impact on our national economy, it is for the Board to determine in the first instance whether this consideration warrants a change in settled law. As Respondent correctly notes:

> [T]he [Administrative Law Judge] may not in good grace overrule the Board in *Woolworth* . . . .[7]

Accordingly, being bound to follow the law as announced by the Board, I reject Respondent's contention in this regard and sustain the General Counsel's use of the traditional "quarterly" formula in the computation of net backpay.

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[3] Hurt was in the Far East recovering from a recent injury and was therefore unable to travel to Houston in January. He subsequently returned and his written deposition was secured by the parties on April 4, 1980. His deposition was timely submitted to me and I thereafter received it into evidence and ordered the record closed.

[4] The appropriateness of the hourly rates paid to a few of the discriminatees who accepted reinstatement is in issue (see below).

[5] *N.L.R.B. v. Seven-Up Bottling Company of Miami, Inc.*, 344 U.S. 344 (1953).

[6] Resp. br., p. 11.

[7] *Ibid.*

B. *Attack on the Brown & Root Measure of Gross Backpay*

1. Background

The first question which confronts the Board's prosecuting arm, the Office of the General Counsel, at the "compliance" stage of unfair labor practice proceedings in which there has been a remedial order for reinstatement and backpay to wrongfully discharged employees is: "What method should be used to determine the gross earnings which would have been received by the discriminatees if they had not been wrongfully discharged?" As a matter of standard internal procedure, the General Counsel delegates this function to a "compliance officer" in the Regional Office which was responsible for the prosecution of the underlying unfair labor practice case.

In order to make sense of the dispute between the parties as to what should have been the appropriate measure in answering the threshold question posed above, reference must be made to the facts as found in the underlying proceedings.

In the underlying proceeding these findings of the Administrative Law Judge were sustained at all levels of Board and circuit court review:

Respondent operates, *inter alia*, a plant in Pasadena, Texas (the Bayport plant), where it manufactures oxygen, acetylene, and nitrogen. Until late 1975, it accomplished maintenance work[8] by using a "small utility crew" and by subcontracting "most" of the maintenance work to Brown & Root, a large nonunion subcontractor. Having later become disenchanted with this arrangement, Respondent brought in a group of its own employees (the SMAT team), who had worked as traveling troubleshooters. This was to be an interim measure until Respondent could phase out the Brown & Root maintenance employees and replace them by hiring its own maintenance employees.[9]

By mid-July 1976, spurred by concerns over the manner in which Respondent had sought to cut back its maintenance force during a period of overstaffing employees began an attempt to obtain representation from Oil, Chemical, and Atomic Workers International Union, AFL-CIO (the Union). Support for the Union was mainly confined to the maintenance employees[10] and Respondent's agents knew it. On August 20, shortly before the unlawful layoff, Respondent's maintenance supervisor warned a maintenance employee that the organizing effort would lead to maintenance employees being fired and that Respondent would "run everybody out and bring in contract maintenance."[11]

This threat/prediction was borne out on August 25. On that date, Respondent unlawfully "discharged *all* [34] of its employees in the maintenance department at its Bayport plant."[12] This action was taken so that the maintenance work could again be subcontracted to Brown & Root.[13] Characterizing the change, the Administrative Law Judge found that Respondent had, immediately before August 25, used "its own maintenance personnel (assisted by Brown & Root)," but thereafter had resorted "to subcontract situation wherein Brown & Root accomplished *all* maintenance at the Bayport plant."[14]

It is now necessary to trace the manner in which the compliance officer for Region 23 arrived at the gross backpay figures for the 33 discriminatees[15] which are set forth in the General Counsel's backpay specification. Crediting the undisputed testimony of Compliance Officer Van P. Jones, this is how he went about it: After the Fifth Circuit's enforcement of the reinstatement and backpay order respecting the 34 discriminatees, Respondent notifed Jones in April 1979, that it would comply. Jones arranged a meeting with Respondent's attorney, Charles R. Vickery. Jones, Vickery, and Respondent's personnel manager subsequently conferred in early June. Jones asked Respondent's representatives for records or figures reflecting the hours worked by the Brown & Root maintenance subcontracting employees during the backpay period. He also asked for payroll records of the 34 discriminatees from the beginning of 1976 to the date of their discharges on August 25, 1976. Respondent did not, during these discussions, advance any suggestions as to the appropriate measure of backpay for the discriminatees. It did furnish the records requested by Jones (although, as to the requested "Brown & Root" hours, it furnished information which required some extrapolation and followup inquiries in order to derive the actual straight time and overtime hours worked by the nonsupervisory Brown & Root maintenance personnel).

Having derived both the straight time and overtime hours worked during the backpay period by the Brown & Root personnel[16] and the straight time and overtime hours worked in 1976 by the discriminatees until their unlawful termination, Jones made a comparison. This showed that the discriminatees had worked a greater percentage of overtime hours before August 25, 1976, than had the Brown & Root maintenance personnel during the backpay period. Reasoning finally that the actual experience of "replacement" employees is a more reliable measure of the hours which the discriminatees would have worked than would be a projection derived from the varied experiences of the discriminatees before their unlawful discharges, Jones abandoned the "project" approach, adopted the "replacement" approach.[17]

[8] This is work associated with installation, maintenance, and repair of sophisticated production equipment and requires in many cases employees who are skilled journeymen machinists, millwrights, electricians, pipefitters, or other crafts people.

[9] 230 NLRB at 394.

[10] *Id.* at 394-395.

[11] *Id.* at 396.

[12] *Id.* at 399. (Emphasis supplied.)

[13] *Id.* at 400, 402. See also Respondent's written notice to terminated maintenance employees which states, *inter alia*, "Maintenance will be subcontracted . . ." (*Id.* at 402).

[14] *Id.* at 402. (Emphasis supplied.)

[15] While 34 named individuals were found by the Board to have been unlawfully discharged on August 25, 1976, backpay is sought by the General Counsel for only 33 of them. One other discriminatee, Johnnie Williams, was not deemed to have suffered any financial loss and was therefore omitted from the backpay specification.

[16] The accuracy of these computations is not challenged herein.

[17] Indeed, Jones asserts that both he and attorney Vickery agreed in some manner during their first meeting in June 1969 that the "Brown & Root replacement" approach would be the best measure. Jones also re-

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The "Brown & Root replacement" approach showed that each replacement employee worked a scheduled minimum of 40 hours per week in each week of the backpay period. To determine how many overtime hours said replacements worked, Jones derived a monthly average taken from the total number of Brown & Root maintenance employees employed in a given month divided into the total number of overtime hours worked during the same period. He then presumed that each discriminatee would have worked 40 hours per week at straight time and would have worked overtime according to the average overtime worked by replacements in the same period.

2. Conclusions: "Brown & Root Replacements" v. "Kalmas and Cook" formulas

In arriving at the appropriate yardstick for determining how many hours discriminatees would have worked during the backpay period, the Board has a wide range of discretion. It is evident that using the hours worked during the backpay period by persons who "replaced" the discriminatees by doing the maintenance work which the discrminatees formerly performed is one such reasonable method and one which is commonly used.[18] I conclude that the use of the hours worked by the Brown & Root maintenance subcontract employees was essentially a "replacement" approach. Particularly in light of the findings in the underlying proceeding that *all* of Respondent's maintenance employees were terminated on August 25, 1976, and their work was thereafter performed by Brown & Root employees, I further conclude that it was reasonable to treat that latter group of employees as "replacements" for the discriminatees. As noted above, the compliance officer using the predischarge hours experiences of the discriminatees but rejected that approach even though it would have resulted in higher projections of overtime earnings than would reference to the average overtime worked each month by the Brown & Root maintenance group. Respondent does not attack the failure to use projections from the discriminatees' predischarge experiences and I conclude that resort to replacements rather than projections showed due solicitude for considerations of fairness and was therefore not "punitive."

It was not sufficient, however, for Respondent, in answering the backpay specification which plead the Brown & Root replacement formula, to merely object to its frailty and to complain that there were elements of speculation in its application. Rather, under the clear mandate of Section 102.54 of the Board's Rules and Regulations, it was incumbent upon Respondent to set forth with precision an *alternative* method of computation and to plead, and prove at the hearing, that its own alternative was more likely to be accurate and just as a measure of the gross backpay owed to the discriminatees.[19]

After initially filing an unsuitable answer, Respondent eventually proposed an alternative to the "replacement" approach—that the hours worked by employees Kalmas and Cook (who were in Respondent's employ before the unlawful mass discharge and who continued thereafter in Respondent's employ throughout the backpay period)—were more reliable indicators of the hours which the discriminatees would have worked had they remained in Respondent's employ.[20]

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calls that, at some point in that meeting, Vickery "mentioned that there were a few employees still doing maintenance work at Big Three [i.e., employed by Respondent—not Brown & Root] . . . but since the decision by the Administrative Law Judge indicated that all the maintenance work had been subcontracted out [Jones explained], I did not pursue the matter."

[18] As the District of Columbia Circuit stated in *N.L.R.B. v. Rice Lake Creamery Company*, 365 F.2d 888 at 891 (1966):

> This formula [i.e., taking the average number of straight time and overtime hours worked by all full-time employees who performed production work during the backpay period and multiplying this average by the appropriate hourly wage rate for each discriminatee] may not reach the exactly correct figure, but there is no suggestion of a formula that could, since the discriminatees did not actually work during the period. The formula used in a reasonable and legal basis for computation of gross amounts, and has had approval in court decisions. *N.L.R.B. v. Brown & Root, Inc.*, 311 F.2d 477 (8th Cir.); *N.L.R.B. v. East Texas Steel Castings Co.*, 255 F.2d 284 (5th Cir.).

[19] Sec. 102.54(b) and (c) of the National Labor Relations Board Rules and Regulations, Series 8, as amended, provides as follows:

> (b) *Contents of the answer to specification.*—The answer to the specification shall be in writing, the original being signed and sworn to by the respondent or by a duly authorized agent with appropriate power of attorney affixed, and shall contain the post office address of the respondent. The respondent shall specifically admit, deny, or explain each and every allegation of the specification, unless the respondent shall so state, such statement operating as a denial. Denials shall fairly meet the substance of the allegations of the specification denied. When a respondent intends to deny only a part of an allegation, the respondent shall specify so much of it as is true and shall deny only the remainder. As to all matters within the knowledge of the respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial shall not suffice. As to such matters, if the respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, he shall specifically state the basis for his disagreement, setting forth in detail his position as the applicable premises and furnishing the appropriate supporting figures.
>
> (c) *Effect of failure to answer or to plead specifically and in detail to the specification.*—If the respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without notice to the respondent, find the specification to be true and enter such order as may be appropriate. If the respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by subsection (b) of this section, and the failure so to deny is not adequately explained, such allegation shall be deemed to be admitted to be true, and may be so found by the Board without the taking of evidence supporting such allegation, and the respondent shall be precluded from introducing any evidence controverting said allegation.

[20] At the hearing, Respondent sought to show that the use of Brown & Root employees as replacements for the discriminatees was potentially erroneous since, assertedly, some of the Brown & Root maintenance employees had been working for Respondent on a subcontract basis even before the unlawful mass discharge. For the same reasons more fully explicated *infra* at fn. 21 in connection with a similar attempt by Respondent belatedly to shift ground, I ruled that Respondent's efforts were untimely and were beyond the scope of the issues raised by the backpay specification and Respondent's answer(s) thereto—all in contravention of the plain mandate of Sec. 102.54, *supra*. In brief, Respondent sought to make a record showing that the use of Brown & Root employees as replacements involved the use of an overly broad class. Respondent conceded, however, that it had never proposed that a more limited group of Brown & Root employees be used to measure the discriminatees' backpay. Respondent also conceded that it had not itself attempted to indentify a more limited group of Brown & Root employees who might prop-

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I now consider whether Respondent came forward with evidence to show that the General Counsel's "Brown & Root" approach (which I have already concluded met a threshold test of "reasonableness") was inferior to the "Kalmas and Cook" approach affirmatively proposed by Respondent.

Employees Kalmas and Cook were, at all times material herein, employed in Respondent's maintenance department under the supervision of A. J. Fagan (until his death in January 1978) or one of Fagan's successors. Fagan and his successors were in charge of a group of utility maintenance employees, most of whom performed miscellaneous cleanup work and occasionally were assigned to assist journeyman machinists and millwrights when their regular "helpers" were unavailable.

Kalmas and Cook were not included in the unlawful mass discharge, however, notwithstanding that they were technically within Respondent's "maintenance" department and notwithstanding that the Administrative Law Judge found in the unfair labor practice case that *all* maintenance employees had been terminated and supplanted by Brown & Root subcontracting employees. From the testimony of Lemuel Guthrie, currently Respondent's maintenance manager, it is clear that Kalmas and Cook were always treated as occupying unique positions with unique responsibilities. Kalmas' "normal duty" has been to inspect and maintain and repair the extensive steam systems at the Bayport plant. Cook was "normally assigned" to repair inlet air filters and, in addition, he "is and has been, since he's been at the Bayport plant, responsible for the lubrication of equipment. That includes greasing, taking oil samples, checking for water in oil consoles, centrifuing oil to remove impurities, inspections on the levels of oil consoles, gear boxes, and other equipment; anything having to do with lubrication." Kalmas and Cook have, at all times material, spent anywhere from 80 percent to 95 percent of their time performing these typical tasks which are reserved to them because of their specialized "expertise." Even after the mass discharge and the replacement of the "maintenance department" by Brown & Root crews, Kalmas and Cook continued to do "basically, the same job they'd always been doing." Kalmas and Cook were, therefore, not "replaced" by Brown & Root personnel, as Guthrie concedes, because they performed distinct work functions from those typically performed by the balance of the maintenance machinists, millwrights, helpers, and relatively unskilled "utility" personnel who were supplanted by Brown & Root employees.

These facts, standing alone, virtually compel the conclusion that the hours worked during the backpay period by Kalmas and Cook are a particularly inappropriate measure of the hours that the discriminatees would have worked. While the record shows that Kalmas and Cook worked under the same "utility" supervisor (Fagan and successors) as did a small number of the discriminatees, it is equally clear that they were entirely unrepresentative of the class of discriminatees as a whole because of their special functions in the plant. Since Kalmas and Cook were never treated by Respondent as being part of the otherwise distinct maintenance crew, since they were not "replaced" by Brown & Root maintenance employees in connection with the unlawful mass discharge, since they were not shown to have performed work during the backpay period which is representative of the work done by the class of discriminatees as a whole, or even that of subgroups within that class[21] Respondent's alternative proposal for measuring and computing gross backpay must be rejected.[22]

I therefore sustain the General Counsel's use of the premises and formulas used in the backpay specification and find that his gross backpay figures may be adopted.[23]

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erly be treated as the discriminatees' replacements; indeed it conceded that this would be difficult, if not impossible. Respondent further conceded that it had never made alternative backpay calculations based on a more limited class. Finally, Respondent asserted that it would "stick with Kalmas and Cook" as being the only appropriate measure of the discriminatees' backpay.

[21] On brief, Respondent now argues that the "Kalmas and Cook" measure of gross backpay ought at least to be considered appropriate for determining the gross backpay of certain individual discriminatees who worked in relatively unskilled "utility" positions in Fagan's crew before their discharge. I reject that claim. Respondent never affirmatively raised this alternative position before or during the hearing, nor did it identify the more limited class of discriminatees for whom the "Kalmas and Cook" measure might be more appropriate, nor did it present calculations of gross backpay for such a limited class. Consistent with the policies underlying the strict pleading requirement set forth in Sec. 102.54 of the Board's Rules and Regulations, it is simply too late at the briefing stage to suggest an alternative measure of backpay which would, if entertained, require more precise and detailed inquiry and litigation than that which has taken place. *Airport Service Lines, Inc.*, 231 NLRB 1272, 1273 (1977); *3 States Trucking, Inc., and its successor Southern Illinois Minerals Corporation*, 252 NLRB 1088 (1980). Even assuming that the merits of this belated proffer of yet another way to measure backpay a handful of the discriminatees could be entertained on its merits, I find that Respondent's evidence is unpersuasive. On this record, it is clear that Kalmas and Cook performed work which was for the most part so functionally distinct even from that performed by other members of Fagan's utility crew, that the hours worked during the backpay period by Kalmas and Cook would be less appropriate as a measure than would be reference to hours worked by the Brown & Root replacements.

[22] Without detailing their infirmities, it suffices to state that Respondent's alternative "calculations" of backpay for each discriminatee using the "Kalmas and Cook" measure are virtually incomprehensible. They also involve so many questionable or clearly unwarranted assumptions that they could not be relied on to reach correct backpay figures for each discriminatee even if I were to conclude that the hours worked during the backpay period by Kalmas and Cook was a proper measure of the hours which the discriminatees would have worked.

[23] The means by which the General Counsel determined the hourly rate of pay which each discriminatee would have received at any given point within the backpay period is not directly challenged by Respondent. Rather, Respondent has simply attacked the use of Brown & Root replacements' hours as the measure of the hours which the discriminatees would have worked. There is, however, a marginal dispute raised by Respondent's answer (or answers) as to the claim in the backpay specification that certain discriminatees who accepted reinstatement were reinstated at an improperly low hourly rate. Since this relates to the questions of how the backpay period hourly rates in the specification were derived, I set forth below the means by which these figures were reached. I conclude that the derivations in this regard were reasonable, and, in the absence of any specific challenge or proffer by Respondent of an alternative means of deriving backpay period hourly rates, I have adopted the General Counsel's calculations in this regard (and see discussions below of the controversies, if any, over the reinstatement rates paid to certain discriminatees).

To determine the presumptive hourly rates which each discriminatee would have received at any given time, Compliance Officer Jones used as a base the hourly earnings of each discriminatees as of his unlawful dis-

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It remains to determine whether or not the General Counsel met his burden of demonstrating that certain expense and other "special" claims for certain discriminatees were appropriate for reimbursement by Respondent; and whether Respondent met its burden of coming forward to show that certain discriminatees lost their entitlement to backpay during certain periods by failing in one way or another in their "duty to mitigate." This requires a case-by-case examination, to which I now turn.

III. CASE-BY-CASE ANALYSIS OF INDIVIDUAL CLAIMS

A. *Introduction*

Set forth below are certain general principles covering recurring questions in the various claims dealt with below. It is helpful to recall in addition that, while the General Counsel customarily, as herein, affirmatively pleads that each discriminatee received certain amounts of interim earnings, these are in the nature of concessions—the burden being Respondent's to show that the appropriate net backpay is something less than the gross backpay amounts which are set forth in the specification.[24]

charge, supplemented at appropriate times by raises which each would have received had he remained in Respondent's employ.

In determining how much a discriminatee would have received as a raise, when such raise would have been received Jones relied on two different types of applicable date furnished by Respondent. First, Respondent effected several across-the-board percentage raises at identifiable points during the backpay period. Whenever such a blanket raise was given, Jones "gave" an appropriate percentage raise to each discriminatee. In addition, however, Respondent advised Jones, and furnished him with supporting background data, that Respondent had a practice of granting periodic "merit" raises under a program whereby deserving employees would be reviewed every 4 to 6 months and given a merit raise until they reached a "top," or ceiling, within their classification. In order to determine whether a given discriminatee would have received a merit increase, Jones started with the hourly rate each was earning at the time of the mass discharge on August 25, 1976. Those who were then receiving the top rate payable as of that date were presumed by Jones to be ineligible for any additional merit increases during the backpay period. In such cases, he simply determined that each would have continued to be paid at the prevailing top at any given point; and would have been reinstated at the top rate for his classification prevailing as of the date on which reinstatement was eventually offered. As to those who were receiving less than top rate as of the unlawful mass discharge, Jones adopted a presumption that they would never have been brought to the top; but, neither would they have dropped to the bottom or stayed at a fixed rate. Rather, it was presumed that each such discriminatee would have edged steadily closer to the prevailing top, without ever reading it.

It remained for Jones to determine that when these presumptive merit raises would have been granted. Jones did this by presuming that merit increases would have occurred each 6 months during the backpay period (taking Respondent's admitted practice of making a merit review every "4 to 6 months" and giving Respondent the benefit of the doubt by using the latter interval). The amount of each merit increase so "given" by Jones was necessary at each 6-month point to bring the discriminatee proportionally nearer the top than he was as of August 25, 1976.

The approach taken by the compliance officer in this regard is best exemplified by reviewing the way in which presumptive hourly wage rates are set forth for two discriminatees, Thurman Aldrige, Jr., and Thomas Allbright on p. 7 of the backpay specification (G.C. Exh. 1(c)).

[24] *N.L.R.B.* v. *Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963); *Florence Printing Co.* v. *N.L.R.B.*, 376 F.2d 216, 222–223 (4th Cir. 1967). cert. denied 389 U.S. 840. Note also, however, that it is the Board's policy for the General Counsel, after issuance of the backpay specification, to turn over to Respondent "all factual information in documents obtained or prepared by the Regional Office which is relevant to the computation of net backpay, including search for employment or availability for employment, or other forms of reimbursement," including "all affidavits or other documents concerning discriminatees' interim employment, search for employment or availability for employment." NLRB Case Handling Manual (Part 3), Compliance Proceedings, Sec. 10663.1-3. The record reflects that this policy was compiled with herein and that Respondent therefore had access to virtually all the information relied on by the General Counsel in issuing the backpay specification.

Some principles of general application bearing upon the broad "duty to mitigate" issue are as follows (250 NLRB at 550–551):[25]

> An employer may mitigate his backpay liability by showing that a discriminatee "wilfully incurred" loss by "clearly unjustifiable refusal to take desirable new employment." (*Phelps-Dodge Corp.* v. *N.L.R.B.*, 313 U.S. 177, 199–200 (1941)), but this is an affirmative defense and the burden is upon the employer to prove the necessary fact. *N.L.R.B.* v. *Mooney Aircraft, Inc.*, 366 F.2d 809, 813 (C.A. 5, 1966). The employer does not meet that burden by presenting evidence of lack of employee success in obtaining interim employment or low interim earning. Rather, the employer must affirmatively demonstrate that the employee "neglected to make reasonable efforts to find interim work." *N.L.R.B.* v. *Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575–576 (C.A. 5, 1966). Moreover, although a discriminatee must make "reasonable efforts to mitigate [his] loss of income . . . [he] is held . . . only to reasonable assertion in this regard, not the highest standards of diligence," *N.L.R.B.* v. *Arduini Manufacturing Co.*, 394 F.2d 420, 422–423 (C.A. 1, 1968). Success is not the measure of the sufficiency of the discriminatees' search for interim employment; the law "only requires an honest good-faith effort." *N.L.R.B.* v. *Cashman Auto Co.*, 233 F.2d 832, 836 (C.A. 1). And in determining the reasonableness of this effort, the employees' skills and qualifications, his age and the labor conditions in the area are factors to be considered. *Mastro Plastic Corp.*, 136 NLRB 1342, 1359.
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> * * * * *
>
> In determining whether an individual claimant has made a reasonable search for employment, the test is whether the record as a whole establishes the employee had diligently sought other employment during the entire backpay period. *Saginaw Aggregates, Inc.*, 198 NLRB 598 (1972); *Nickey Chevrolet Sales, Inc.*, 195 NLRB 395, 398 (1972).
>
> It is also well established that any uncertainty in the evidence is to be resolved against the Respondent as the wrongdoer. *N.L.R.B.* v. *Miami Coca-Cola Bottling Company*, 360 F.2d 569 (5th Cir. 1966); *Southern Household Products Company, Inc.*, 203 NLRB 881 (1973).

B. *Individuals Findings and Conclusions*

Applying the foregoing principles, I reach the following results in individual cases:

[25] Borrowing from a recent synopsis in *Highview, Incorporated*, 250 NLRB 549 (1980).

1. Thurman T. Aldridge, Jr.

Based on formulas already validated, the General Counsel claims for Aldridge, after deduction of interim earnings, net backpay of $12,966; and, in addition, unreimbursed hospital and medical expenses of $1,018.87 which would have been fully covered by Respondent's fully paid insurance policy had Aldridge not been wrongfully discharged.

Respondent made certain specific affirmative claims in its third supplemental answer as to Aldridge, but introduced no evidence to support them. Rather, it adduced evidence tending to show that Aldridge sought work through union hiring halls within the backpay period and Respondent now claims on brief that this amounted to a willful failure to seek suitable interim employment during various unspecified periods. Respondent does not specifically contest the medical claims.

The General Counsel met his affirmative burden of proving the unreimbursed medical expenses and of proving that Respondent's group insurance program would have covered them (see and compare claims shown on G.C. Exh. 3(a) with summary of Respondent's insurance program (G.C. Exhs. 4-5)). I therefore sustain the medical claim *Deena Artware, Incorporated*, 112 NLRB 371, 375 (1955).

As to Aldridge's resort to union hiring halls as his basic means of obtaining interim employment (first through a Laborers local, and later through an Ironworkers local), I find that this enabled him to obtain fairly regular interim employment at jobs which required roughly the same degree of skill as did his job as a relatively unskilled maintenance "utility" helper with Respondent.

Respondent cites no authority for the proposition that Aldridge's principal reliance on union-run hiring halls to obtain interim employment constitutes an unreasonable limiting of employment opportunities amounting to willful idleness. There is authority contrary to Respondent.[26] I find that Respondent has failed to satisfy its burden of showing that Aldridge "neglected to make reasonable efforts to find interim work." *Miami Coca-Cola, supra*, 360 F.2d at 575-576.

Accordingly, exclusive of interest, Aldridge is owed net backpay of $12,966 and is further owed reimbursement for his medical claim of $1,018.87, for a total of $13,985.

2. Thomas M. Allbright

The General Counsel claims for Allbright $11,825 in net backpay, and an additional reimbursement for Allbright's costs in maintaining insurance coverage which Respondent provided gratis.

Respondent contests[27] two specific features of the claims made for Allbright. First, that portion of the (otherwise uncontested) claim for additional mileage expenses incurred by Allbright in connection with his securing of, or working at, interim employment.[28] Specifically, Respondent argues, based on concessions made by Allbright at the hearing, that Allbright's "excess mileage" claims while employed at Dart Industries were false.

Allbright conceded at the hearing that, by the time he became employed at Dart in the third quarter of 1977, his new residence was closer to the Dart plant than it was to Respondent's Bayport plant.[29] Accordingly, it being clear that Allbright did not, in fact, go "out-of-pocket" in commuting from his new residence to the Dart job in amount greater than he spent commuting from his old residence to Respondent's plant, I agree that these Dart-associated "additional mileage" claims are inappropriate and should be disallowed. Accordingly, the interim earnings reported for the Dart employment (third quarter 1977 through fourth quarter 1978) should not have been reduced by said additional mileage claims (see net calculations below).

Second, Respondent asserts that Allbright voluntarily quit his full-time job at Dart at which his gross earnings were sufficient to equal or exceed the gross backpay for the same periods which the General Counsel claims he would have earned at Respondent's plant. Accordingly, Respondent claims its backpay obligation to Allbright became tolled as of the day he quit the Dart job. The General Counsel does not address this argument on brief.

The entire record bearing on this issue is as follows:

> [By Respondent's attorney on cross-examination]
>
> Q. Now, why did you leave Dart?
> A. I didn't get along with the supervisor out there.
> Q. And you quit?
> A. Yes, sir.

When an employee *unreasonably* refuses or quits an interim job during the backpay period—especially one

[26] *Local 90, Operative Plasterers and Cement Masons, etc. (Southern Illinois Builders Association)*, JD-350-80, citing *Seafarers International Union of North America, Atlantic, Gulf, Lakes & Inland Waters District, AFL-CIO (Isthmian Lines, Inc.)*, 220 NLRB 698 (1975).

[27] Here, as elsewhere, few, if any, specific contentions were raised bearing on the duty-to-mitigate issue in any of Respondent's answers to the backpay specification. As to Allbright, for example, the closest thing to specificity was in Respondent's claim in its initial answer that Allbright was part of a class of employees who "effectively removed themselves from the labor market by going into self-employment whereby little or no money was actually earned." No proof of this type was adduced at the hearing. On brief, this contention is abandoned by Respondent in Allbright's case and other defensive contentions are raised based on the fruits of litigation. While strict adherence to Sec. 102.54 of the Board's Rules and Regulations might warrant my refusal to address these revised and sometimes wholly new defensive contentions, I have generally considered such contentions where no objection was made to the introduction of facts bearing thereon, and there was an opportunity to fully litigate the questions. It should be noted, however, that the phrase "Respondent contests" more often than not refers to positions adopted by Respondent at the briefing stage which are either different from, or in addition to, specific defenses raised in its answer or answers.

[28] Here, as elsewhere in the case of "additional mileage" claims, the General Counsel subcontracted the additional mileage costs of working for a new employer from the gross interim earnings for that employer, resulting in a lower total of interim earnings to be subcontracted from the gross backpay figure in any quarterly period.

[29] Evidently (the record is not clear here) the additional mileage was predicated on the assumption that the mileage to Dart from the rental residence which Allbright occupied when employed by Respondent was greater than the mileage from the same residence to Respondent's Bayport plant. Whether this was, in fact, true is not clear from Allbright's murky testimony on the subject.

which pays him as much or more than he would have received from the employer who unlawfully discharged him—he may be deemed to have engaged in a willful loss of earnings in derogation of his duty to mitigate damages. *Florence Printing Company*, 158 NLRB 775, 791-792 (1966); *Artim Transportation System, Inc.*, 193 NLRB 179, 183 (1971). The question here is whether this record would support a finding of "reasonableness" or "unreasonableness" in Allbright's admitted action of quitting his job at Dart.

It has been noted as a general proposition that Respondent bears the burden of establishing that an employee failed in some required manner to mitigate backpay damages. Accordingly, the more precise question presented here is whether Respondent met that burden by the extraction of the above-quoted testimony.

I think that Respondent did meet that burden; and I conclude that the General Counsel's failure to come forward with testimony from Allbright (and/or from other sources), which was geared to show that some reasonably compelling and extraordinary circumstances caused Allbright to quit the Dart job, warrants the conclusion that there were not any such circumstances.

Even conceding that not "getting along" with one's supervisor is a less-than-desirable state of affairs, no inference can be drawn from that fact alone that the supervisor was responsible for this state of affairs, let alone an inference that quitting was the only reasonable means of dealing with such a job condition. Where the surrounding circumstances were within the peculiar knowledge of the backpay claimant, would be unreasonable to require Respondent to prove *not only* the fact that the claimant quit a good interim job, *but also* the absence of any of the myriad types of exceptional surrounding circumstances which the Board has or might treat as making the decision to quit a "reasonable" one.[30]

Rather, once Respondent showed that Allbright had quit the equivalent (in earnings) Dart job, it fell to the General Counsel to demonstrate that the decision to quit was, in the circumstances, "reasonable." Absent such a showing by the General Counsel herein, I conclude that Allbright's quitting of the Dart job amounted to a willful forefeiture of equivalent interim earnings. For all that this record shows, Allbright would have continued to receive earnings from that job which would have equaled or exceeded the earnings which Respondent would have paid him. I therefore conclude that Allbright's right to further backpay was extinguished by his quitting at Dart.

Recapitulation of Allbright's Net Backpay

As to the "additional mileage" matter, the General Counsel wrongly sought to reduce Allbright's interim earnings at Dart from fourth quarter 1977 through first quarter 1979 by $260 in each quarter. However, in all but three of those quarters (fourth quarter 1977, first quarter 1978, and fourth quarter 1978), Allbright's interim earnings were sufficiently large to yield "0" net backpay even under the General Counsel's formula.

[30] See, e.g., *Florence Printing, supra*, and cases cited therein at 792, as examples of considerations which cause the Board to conclude that backpay was not tolled by the quitting of an interim job. See also *Bonnar-Vawter, Inc.*, 135 NLRB 1270, 1273 (1962); *Artim Transporation, supra.*

Accordingly, the only difference in result is in those latter-named quarters and the correct net backpay figures must be reached by deducting $260 from the amounts in the specification, resulting in these revisions:

Fourth quarter 1977	$998
First quarter 1978	0
Fourth quarter 1978	0

As to the tolling of further backpay after quitting the Dart job in first quarter 1979, Allbright still had sufficient interim earnings at the end of that quarter to yield zero net backpay under the calculations in the specification for that quarter. In second quarter 1979 (during which Respondent offered reinstatement to Allbright and others—thereby admittedly tolling backpay), the net backpay claimed by the General Counsel is $96. This amount is disallowed inasmuch as I have found that Allbright willfully avoided interim earnings from Dart which would have equaled Respondent's gross backpay obligation in the final quarter of the backpay period.

Incorporating these changes, Allbright's net backpay is $11,188. Adding to that the uncontested cost amount of $237 for family insurance coverage (at $13.65 per month) which Allbright incurred at Dart in order to maintain insurance coverage similar to that provided gratis by Respondent, Allbright is owed a total of $11,461, exclusive of interest.

3. James E. Bowlin

The General Counsel claims for Bowlin $40,120 in net backpay, plus an additional $208 reflecting the difference between the rate he should have received when he was reinstated by Respondent and the rate he actually received.[31]

The principal reason why Bowlin's net backpay claims is substantially higher than the claims of most other discriminatees is that, due to an industrial injury at an interim employer, he was unable to perform any physical labor from the first quarter of 1977 until the end of the backpay period.

It is undisputed, as Bowlin testified, that Bowlin was the victim of an explosion at an interim employer's plant resulting in severe, multiple leg fractures. He was hospitalized continuously for 7 weeks thereafter, and was not cleared by his physician for physical work (including welding, which was his job at Respondent) until May 1979, when he was reinstated by Respondent. He drew workmen's compensation throughout the backpay period after his injury.

The General Counsel asserts that Respondent's gross backpay obligation to Bowlin was not tolled by his unavailability for work due to an injury resulting from work at an interim employer. The General Counsel concedes that workmen's compensation benefits should be treated as an offset to the gross backpay obligation, however,

[31] The General Counsel concedes that Respondent eventually raised Bowlin's hourly rate to that which he should have received. The $208 claimed in this regard is the differential for the period commencing with his reinstatement on May 7 through August 12, 1979, on which latter date his rate was elevated to a concededly appropriate level.

and those amounts were so treated in the backpay specification.

Respondent, without citing authority, simply argues that Bowlin is "not entitled" to backpay for periods when he was unable to work since "Respondent's discharge of Bowlin did not make Respondent an insurer of Bowlin's health . . . [and] Respondent was powerless to cure or otherwise minimize Bowlin's injury."[32]

The Board settled this question in *American Manufacturing Company of Texas*, 167 NLRB 520 at 522-523 (1967). There, the Board noted that some injuries or illnesses which render a discriminatee unable to obtain gainful interim work are part of the "hazard of living generally," whereas others may be said to be "closely related to the nature of the interim employment" and therefore would not have been suffered by the discriminatee if he had not been unlawfully discharged. If of the former type, the Board stated, "disallowance of backpay for all periods of unavailability because of such illness is proper." If of the latter type, "the period of disability will not be excluded from backpay." (*Id.* at 522.) The Board further held, however, that in such latter cases, workmen's compensation payments may be treated as offsetting interim earnings. (*Id.* at 523.)

There is no question that Bowlin's injuries were directly a result of his working at interim employment and, therefore, his resulting unavailability for work did not toll Respondent's continuing backpay obligation. I therefore sustain the General Counsel's claim in this area as being wholly in accord with established law.

As to the question whether Bowlin should have been paid $9.75 per hour when he was reinstated, rather than the $9.38 rate which he actually received, it is not at all clear that there is a genuine dispute. Respondent admitted, in response to Compliance Officer Jones' prespecification interrogatory, that Bowlin was reinstated at the rate of $9.38 per hour.[33] In the preceding section, I have summarized with approval the basis on which Compliance Officer Jones determined when, and how much, but for their unlawful discharges, the discriminatees would have received in wage increases during the backpay period.[34] Respondent generally denied the correctness of the allegation in the specification that Bowlin should have been reinstated at $9.75 per hour. It elsewhere conceded, however, that the then prevailing "top" was $9.79.[35] Respondent also elsewhere affirmatively averred in its amended and supplemental answer (see quarterly computation sheets pertaining to Bowlin attached thereto) that Bowlin, as an "A" maintenance man, should have been reinstated at the "top" ($9.79) rate. As noted above, Bowlin was raised to that $9.79 rate within about 3 months of his reinstatement. At no time did Respondent introduce evidence supporting its choice to pay Bowlin $9.38 per hour for the first 3 months after his reinstatement. Bowlin's eventual elevation to $9.79 per hour, considered against the other seeming admissions set forth above, leads me to conclude that Respondent now concedes that he should have been reinstated to at least the $9.75-per-hour rate alleged to have been appropriate in the backpay specification. Respondent's brief is entirely silent on the issue. Accordingly, I sustain the specification in this regard as well.

The entire specification as to Bowlin is therefore correct. Respondent owes him, exclusive of interest, $40,120 for net backpay before his reinstatement, plus an additional $208 in postreinstatement-rate differential, or a total of $40,328.

4. Jesse D. Burleson

The total claim for Burleson is $5,077, including $332 in costs of maintaining comparable coverage. The General Counsel proved at the hearing the particulars of Burleson's special claim for reimsbursement of medical insurance premiums and I have earlier found the overall formula used by the General Counsel to derive Burleson's gross backpay entitlement to be a correct one. Respondent did not introduce any evidence tending to show that Burleson failed to mitigate damages during the backpay period. Respondent raises no particular arguments as to Burleson in its brief. Instead, it includes him in a class of none employees as to whom the only defense is that their gross backpay should have been computed by using the "Kalmas and Cook" formula and by disregarding the *Woolworth* quarterly method of computation.[36] I have rejected those general defenses. The others in this "catchall class are James Ellis, Daniel G. Legget, Ricard McBride, Robert Molis, Charles Rodriquez Talmadge F. Smith, Johnny Trojanowski, and Michael Lee Vickery.

Accordingly, I sustain the net backpay figures urged by the General Counsel. Burleson is owed, exclusive of interest, $4,745 in net backpay, plus $332 in insurance costs, totaling $5,077.

5. Gary A. Carrico

In the original backpay specification, the General Counsel had sought for Carrico $7,587 in net backpay. This involved a special claim for cost of medical insurance premiums (totaling $294). Otherwise, the pleaded total was the product of the overall formula which I have already approved.[37]

Before the hearing, the General Counsel revised that calculation and, as reflected in his amendment to the backpay specification (G.C. Exh. 2), it was conceded that Carrico was "unavailable for work due to illness of himself or his wife" in third quarter 1978, therefore tolling Respondent's backpay obligation for that period. Revising his calculations accordingly, the net backpay

[32] Resp. br. at 18-19.

[33] G.C. Exh. 6, attachment 1, to Respondent's reply letter.

[34] Consistent with that overall approach, Jones determined in Bowlin's case as follows: At the time of his discharge, Bowlin earned $7.20 per hour when the "top" rate for that position was $7.50. Working on the assumption that Bowlin's hourly rate would have gradually edged toward whatever "top" prevailed at any given point (but, allowing some doubt for Respondent's benefit, it would never have reached such a top), Jones determined that Bowlin would have been earning at least $9.75 per hour when the prevailing top was $9.79.

[35] G.C. Exhs. 8 and 9. See also Respondent's amended and supplemental answer discussed further below.

[36] Resp. br., p. 78.

[37] It is conceded in the backpay specification that Carrico was out of the labor market from August 28, 1978, through the end of the backpay period, and, therefore, Respondent's backpay obligation for that period was tolled.

claimed for Carrico in the amended specification was $6,995 (including the $294 medical premium expense).

Developments at the hearing as outlined below have caused the General Counsel on brief to make certain further amendments, resulting in a higher net backpay claim of $7,990. In short, these adjustments derive from the General Counsel's assertion that Respondent had a paid sick leave program which, given the nature of Carrico's illness (mononucleosis), would have paid Carrico for a full 40-hour week during his illness had he not been unlawfully discharged.[38]

As set forth in Respondent's pamphlet describing group insurance benefits, Respondent has maintained at all material times a weekly disability program as follows:

> You will receive an income while you are totally disabled and unable to work as a result of a non-occupational accident or a sickness for which benefits are not payable under any workmen's compensation law. The income will begin as of the 1st day of disability if due to accidental bodily injury, or *as of the 4th day* of disability *if due to sickness*. It is payable for a maximum period of 13 weeks for each disability.
>
> * * * * *
>
> You do not have to be confined at your home to receive these benefits, but *you must be under the care of a legally qualified physician*. . . .[39] [Emphasis supplied.]

Carrico testified, in substance, that he contracted mononucleosis at some point in April 1979, and left his job at Gaskin Maintenance as a result. He recovered 6 weeks later, He had gone from the Houston area back to Ohio where his parents lived around the first of May and (extrapolating) he continued his convalescence in Ohio until mid-or late May. He stayed on in Ohio, admittedly seeking no work there or elsewhere for 2 or 3 months. He thereafter returned to the Houston area and immediately located a job at Universal Maintenance where he worked only 1 day. He thereafter concededly left the job market for the rest of the backpay period.

While there is a *prima facie* basis from the quoted portion of Respondent's group insurance plan to conclude that Carrico's illness was of the type which qualified for disability income, there is no record evidence that Carrico was ever under the care of a "legally qualified physician" at any time during his illness. Accordingly, there is lacking any proof that Carrico's illness would have been covered by Respondent's group insurance plan had he been in Respondent's employ when it occurred. In order to sustain the General Counsel's revised contention regarding Carrico's entitlement to disability pay from Respondent, I conceive it to have been part of the General Counsel's *prima facie* burden to have established that Carrico not only had an apparently covered illness, but that he also met the "physician care" requirement under the group plan.[40] I note, moreover, that Respondent was never put on notice that the General Counsel would seek to obtain disability pay for Carrico's illness.[41] Thus, the issue now under discussion was never highlighted and Respondent's cross-examination of Carrico was done in ignorance of the position now taken by the General Counsel on Carrico's behalf.

Since no reliable proof was furnished that Carrico's illness met the "physician care" requirement and since, in any case, the facts were not fully litigated due to the absence of proper notice to Respondent, I reject the General Counsel's revised theory and the resulting boosted claim for Carrico set forth in the General Counsel's brief.

Moreover, even the revised calculations for Carrico reflected in the pretrial amendment to the backpay specification were shown at the hearing to have been based on inaccurate factual premises. Consistent with the theory advanced in that amendment, and in light of the foregoing discussion, it is clear that Carrico was not entitled to backpay while he was out of work due to illness which was not related to his interim job. *American Manufacturing Company of Texas, supra*. It is likewise clear that Carrico was willfully out of the labor market for the balance of the period after his illness while he remained in Ohio and until July when he took his final interim job (for 1 day) with Universal Maintenance. It is also clear that his preillness job with Gaskin Maintenance gave him earnings more than sufficient to offset the gross backpay he would have received from Respondent. It is also clear that he left the job (admittedly for reasons initially related to his illness) without making any effort to preserve his position there when he recuperated. He also conceded that, once he chose to return from Ohio to Houston, "It was really no problem to find a job."

Recapitulating, as soon as Carrico became employed for a full quarter at Gaskin Maintenance,[42] he earned more than he would have had he remained at Respondent during the same period and was, as the specification concedes, entitled to no backpay for the period of his employment at Gaskin. As soon as he contracted mononucleosis,[43] he was unavailable for work and was not entitled to backpay for the period of his illness. As soon as he recovered from illness in mid-or late May, he concededly was unavailable for work until the end of the backpay period except for the 1-day job which he took with Universal in July. Unless one assumes that Carrico's

[38] Here, borrowing from the Board's ruling in *American Manufacturing Company of Texas*, discussed *supra* in connection with Bowlin, the General Counsel must be reasoning as follows: Carrico's illness was *not* attributable to the nature of his interim employment, but, rather, was one of the "risks of living generally" warranting the presumption that Carrico would have become ill from mononucleosis even if he had stayed in Respondent's employ, Thus, it should be presumed that, but for his unlawful discharge, he would have received sick pay from Respondent during a substantial portion of his illness.

[39] G.C. Exh. 4. See also clarifying supplementary stipulation of the parties.

[40] Carrico's testimony affirmatively implies that he was *not* under physician's care, at least when he went to Ohio in early May.

[41] The stipulation regarding the details and scope of the disability income hereafter of discriminatee Legget. The General Counsel did serve notice by his remarks at that point that the specification as to Legget would have to be revised in the light of Respondent's group insurance plan.

[42] I.e., first quarter 1978.

[43] I.e., early in second quarter 1978.

return to the realm of the gainfully employed for 1 day in July 1978 recommended the running of Respondent's gross backpay obligation for the balance of third quarter 1978, there is no basis for finding him entitled to any backpay whatsoever after he left Gaskin at the beginning of second quarter 1978. Considering all of the factors discussed above, and especially the substantial indications that Carrico virtually ceased making attempts to find regular employment after recovery from his illness in mid-May, I conclude that his 1 day of work in third quarter 1978 did not signal a serious intention to return to the labor market. Accordingly, for the combination of reasons noted above, his backpay rights should be deemed to have been cut off as of the commencement of first quarter 1978.

His net backpay as of that point was $3,318. This is what Respondent owes him, exclusive of interest.[44]

6. John E. Coryell

Coryell, along with Fairless, discussed below, was discriminatorily suspended for 3 days in August 1976, shortly before the mass discharge.[45] The backpay sought for that period ($346) is not contested by Respondent.

The General Counsel claims net backpay for Coryell of $11,325. This figure includes a claim for expenses associated with Coryell's move back to California to obtain an interim job. The moving expense amount ($805) is treated in the specification as an offset from interim earnings received in fourth quarter 1976 from his California interim employer.

Respondent raises three specific defenses to the amount claimed for Coryell:

1. He resigned from a higher paying interim millwright job which he secured in the Houston area shortly after his discriminatory discharge and, for personal reasons, traveled to California where his earnings were lower than those he could have received had he stayed at the Houston interim job.

2. Because he quit that Houston-area job, he is not entitled to credit for moving expenses in connection with his return to California.

In any case, he formed the subjective determination shortly after his discriminatory discharge never to return to Respondent's employ, thereby relieving Respondent of any burden of offering him reinstatement, and thereby tolling Respondent's backpay obligation to him.

These are the undisputed facts: Coryell had been employed as a millwright for C & H Sugar Company in California before moving to Houston to work for Respondent. He had been a California resident for 13 years. He and his friend and workmate Fairless had both been induced to quit their jobs at C & H to come to work for Respondent due to the recruitment efforts of Respondent's agent, Lynn Reddick. After being fired by Respondent on August 25, 1976, Coryell obtained temporary[46] interim employment at Petrotex Chemical Corporation in the Houston area, concededly earning more per hour ($7.77 per hour, rather than $7.20 per hour at Respondent). He left Petrotex in mid-fourth quarter 1976 because he preferred California living and because he knew he could find acceptable employment there.[47]

Coryell acknowledged that, when he was discharged by Respondent, he had "an unpleasant feeling" about Respondent and "figured [at the time] that I'd have no other part with [Respondent]; that was it. I never expected any of this[48] to come up."

As to the reasonableness of Coryell's decision to quit his interim job at Petrotex and to return to California, I conclude as follows: Respondent did not establish that the Petrotex job would have paid Coryell the same as, or more than, if he had not been discharged by Respondent. Respondent obtained Coryell's concession that the hourly rate was greater at Petrotex than at Respondent, but this alone did not dispose of the matter. It is entirely conceivable that Petrotex millwrights did not work the same amounts of substantial overtime that Respondent's millwrights did. Having failed in its burden of showing that Coryell's overall earnings at Petrotex (including overtime) would have been at least equal to those he would have received at Respondent, I cannot sustain the argument that Coryell willfully avoided offsetting interim earnings by quitting Petrotex.

As to Coryell's decision to return to the California job market, rather than remaining in Houston, it is sufficient to observe that doing so does not in and of itself reflect a willful failure to seek comparable interim employment. By virtue of his longstanding residency in California, Coryell was familiar with the job market there. He promptly obtained employment in California and he eventually obtained a regular, long-term position there at which he earned more than if he had stayed in Respondent's employ. In *M Restaurants, Incorporated, d/b/a The Mandarin*, 238 NLRB 1575 (1978), enfd. 621 F.2d 336 (9th Cir. 1980), the Board found that the employer's backpay liability should not be reduced because, during the backpay period, an employee had left the San Francisco area to take a job in Taiwan which paid less than the employee would have received from the employer who wrongfully discharged him. In granting enforcement, the circuit panel observed (at 338):

> A discharged employee is not confined to the geographical area of former employment; he or she remains in the labor market by seeking work in an area with comparable employment opportunities. Cf. *N.L.R.B.* v. *Robert Haws Co.*, 403 F.2d 979, 981 (6th Cir. 1968) (discharged employee left State in search of work).

[44] The General Counsel has withdrawn the special claim of $294 for self-paid medical insurance coverage based on clarifying information furnished by Carrico at the hearing. G.C. br., p. 13.

[45] 230 NLRB at 392.

[46] This was to earn enough money to pay for relocation back to California.

[47] By first quarter 1977, Coryell had obtained regular employment at Mare Island Naval Shipyard in California and received earnings there which came within an average of about $1,000 per quarter of what he would have earned at Respondent. By first quarter 1978 and thereafter, Coryell worked at Anheuser-Busch in California and received more than offsetting the interim earnings.

[48] By "this," I infer that Coryell was referring to the eventual decision of the Board that Coryell (and others) were entitled to reinstatement offers from Respondent and the eventual enforcement of the Board's reinstatement order by the Fifth Circuit.

Here, the fact that Coryell obtained comparable work in California and received earnings comparable to those he would have received from Respondent affirmatively tends to show that the California job market was "comparable" to the Houston area market. Respondent never showed otherwise. Accordingly, Respondent has failed to show that Coryell unreasonably failed to mitigate Respondent's backpay liability by quitting at Petrotex and returning to California. Under such circumstances, it is appropriate to treat his reasonable expenses in moving to a new job (proven to have been $630, not the $805 claimed in the specification,[49] as offsetting any interim earnings he received in the same quarter.

I also reject Respondent's claim that Coryell had formed the private intention, upon being unlawfully discharged, that he would not accept a reinstatement offer from Respondent, thereby tolling Respondent's backpay liability. It is unremarkable that Coryell, as he testified, had "unpleasant feelings" about Respondent when he was unlawfully discharged, and that he "figured" that he would "have no other part with" Respondent as a result of his having been discharged. These equivocal remarks do not show that Coryell had irrevocably decided that he would decline a *good-faith* reinstatement offer from Respondent even if made in the context of a remedy for unfair labor practices and with appropriate attendant assurances that Respondent would not discriminate against him because of his union sympathies and activities. Respondent could have tested Coryell's intentions at any point after the unlawfull discharge by making an unequivocal offer in good faith to return him to work. Respondent failed to do so until so ordered by the Fifth Circuit. I will not treat the cited remarks by Coryell as prematurely curtailing Respondent's backpay liability.[50]

Having found that Respondent failed to show that Coryell unreasonably failed to mitigate Respondent's proven gross backpay liability, I therefore sustain the backpay specification, excepting only the erroneous "moving expense" claim of $805 when the true amount was shown to have been $630. Making adjustments for that error, Respondent owes Coryell, exclusive of interest, net backpay of $11,150.

7. Richard A. Dickman

There are two features to the backpay claims for Dickman made by the General Counsel. First, net backpay claimed from his discharge to the point of his reinstatement is $31,999 (Dickman having been one of the few who accepted Respondent's reinstatement offer). Second, it is contended by the General Counsel, as in the case of Bowlin, *supra*, that Dickman was reinstated at a rate lower than that which he would have then been receiving had he never been discriminatorily discharged.[51]

Respondent does not address the second contention regarding the wrongful reinstatement rate. Since I have found the formula used by the compliance officer to be valid and reasonable and since Respondent failed to come forward with any evidence tending to show that some lower reinstatement rate was appropriate, I sustain the backpay specification in this regard.[52]

The main contest about Dickman is over whether or not he ever seriously sought comparable interim employment during the backpay period. His actual interim earnings were, for the most part, relatively small, and they derived almost exclusively from work unrelated to the type of industrial helper work he had performed for Respondent. The General Counsel here rests on Dickman's general testimony that he searched for work and was referred to at least one job by the Texas Employment Commission (TEC) and argues that this gave rise to a presumption—never rebutted by Respondent—that Dickman was always engaged in a good-faith effort to find suitable work.

I find and conclude as follows: From the point of his discharge in late third quarter 1976 until mid second quarter 1977, the only work which Dickman performed was as a guitar player in a roadhouse nightclub on weekends (4 hours each night) receiving $35 per night and, in his words "drinking up the profits." I take notice that

[49] Said expenses incurred were $560 for a rental truck to move his household belongings, $40 total for 2 nights in motels, and $20 total for 2 days of meals, yielding $630.

[50] Respondent cites only the Board's Compliance Manual where, at Sec. 10740.6, it is said, "The Board has ruled in a number of cases that the testimony of the discriminatee that at some time prior to the offer of reinstatement *the witness' mind was actually made up* not to return to work . . . is sufficient to toll backpay as of the time this intention was formed." The manual cites as the only authority for this point of law an old Board case, *English Freight Company*, 67 NLRB 643, 644 (1946). Even there, the Board was at pains to say that it "would not give controlling weight to every gratuitous statement by a complainant as to his reinstatement desires" (*Id.* at 643.) The Board found some special significance, however, to the fact that the employees in question had told a Board agent during an investigation that they would not accept reinstatement, and that such statements made in that context "should be regarded as a binding expression of the employee's intent until repudiated by him." (*Id.* at 644.) Of greatest significance, however, is the fact that the Board overruled *English Freight, supra*, in *Heinrich Motors, Inc.*, 166 NLRB 783 at 786, fn. 24 (1967). There, the Board characterized its longstanding and continuing policy to be to "consistently . . . discount" employee statements indicating unwillingness to accept reinstatement (*Id.* at 785–786).

Accordingly, the Board's Compliance Manual, although "revised" as recently as 1977, is misleading—if not utterly wrong—in its reliance on a case which the Board had overruled 10 years before the most recent "revision" of the manual.

[51] Dickman, who earned the utility "helpers" rate of $5.70 per hour when he was discharged, was reinstated at $7.43. According to formulas employed by the compliance officer which I have already approved, Dickman would have been earning (and therefore should have been reinstated at) $8.30 per hour. Unlike Bowlin, *supra*, the record fails to show that Dickman's reinstatement rate was ever elevated to the one claimed to be correct by the General Counsel. Accordingly, the General Counsel asserts that there is a continuing, unliquidated liability for the postreinstatement pay differential.

[52] From G.C. Exh. 8, it is clear that Dickman was returned to work at the "3-month" rate then paid to "utilitymen" (there being no higher increments for utilitymen beyond that paid after 3 months of service). From G.C. Exh. 9, Respondent contends, however, that Dickman was elevated to $8.09 per hour, 6 months after his reinstatement. This conforms to the rate shown on G.C. Exh. 8 paid to "B" maintenancemen after 6 months of service. From this, I infer that Dickman was given no "service" credit whatsoever for his prior employment with Respondent, nor for the period that he was out of work after his wrongful discharge. I note further from G.C Exh. 8 that a "B" maintenancemen with 24 months' service was being paid $8.73 per hour as of the time when Dickman was reinstated. From all of the foregoing, it appears that, had Dickman remained in Respondent's employ, he would have been earning at least at the "24 month 'B' maintenance" rate of $8.73 by the April 1979 reinstatement date. The General Counsel's assertion that he should have been reinstated at $8.30 per hour is therefore clearly reasonable, perhaps even overly conservative.

this rate of pay is substantially below that earned by professional musicians for club dates. I note further Dickman's virtual concession that he is not a professional muscian.[53] In short, such weekend club work was not so much "employment" as it was a fairly agreeable way to minimize the costs of Dickman's weekend tavern recreation. I therefore do not regard Dickman's appearance on weekends at Jerry's Stardust Club as evidence of a serious pursuit of comparable interim employment.

Dickman testified that during the period that his only earnings were those received from playing guitar at Jerry's Stardust Club, "I was still out looking for labor—you know—work, out in the fields, still putting in applications during the day." When he lost favor as a musician, he states he was "off for a while. I can't remember exactly the period. It was quite a bit of time, there."

He eventually took a job briefly as a paperhanger for an outdoor sign advertising company (Outdoor West). He was initially paid $3.20 per hour, and was later raised to $3.50 per hour for this 40-hour-per-week job. His gross earnings on that job which began in late second quarter 1977 and lasted until early third quarter 1977 were $942, reflecting approximately 7 full weeks of work.

He claims to have been seeking other work even while employed at Outdoor West ("I was still making the rounds to drop off applications at what offices were open"). He also quit[54] his Outdoor West job and chose to go to college in September 1977. He abandoned academic pursuits without finishing the semester, however. The General Counsel concedes, and the backpay specification so reflects, that Dickman was out of the labor market during his period of college attendances (September 1, 1977-January 1, 1978).

His total earnings in first quarter 1978 were $464. This included $27 received for less than a full day's work for Crown-Vee Construction (he and his friend quit because the cooling tower construction work was dangerous during rainy weather). The balance of the earnings was from a construction job for Callie[55] Construction Co. which paid between $8.50 and $8.90 per hour. He earned another $875 from Callie in second quarter 1978 before being laid off and out of work for the balance of that quarter.[56]

In third quarter 1978, he earned a total of $135 working for the Houston Post. In fact, he was a newspaper delivery person working on piece rates. He did this for an indefinite period. He states that he took that job reluctantly, only after being induced to apply on the strength of an advertisement for an "assistant manager" job which guaranteed $200 a week, plus 17 cents per mile. This latter job was offered to him at the end of his stint as a delivery person, but he turned it down. He earned another $392 from the Houston Post in fourth quarter 1978. Also during that quarter, he took a regular job at Charles Parker Music Company as a musical instrument salesman earning $3.25 an hour. He concedes that musical experience was not a prerequisite for that job. He stayed at that job through the balance of the backpay period, earning in fourth quarter 1978, first quarter 1979, and second quarter 1979, respectively: $761, $2,453, and $190.

Some very vague and general testimony regarding Dickman's searches for interim employment has already been noted above. In addition Dickman testified (again generally, and without reference to particular time periods) that he sought work in the Bayport area (a huge industrial area where many refinery and petrochemical-related industries are located). As he put it: "I went up and down . . . Bay Area Boulevard, Texas City, all over the city, out to Chocolate Bayou. I have had applications everywhere."

As noted above, the General Counsel relies on testimony of this nature as evidence of a good-faith search for comparable work on Dickman's part and argues that it was Respondent's burden to introduce evidence suggesting to the contrary. I believe circumstantial evidence introduced by Respondent, including Dickman's testimony as a whole, reveals that Dickman was untruthful in his highly vague claims to the effect that he had "applications everywhere." I note first that, with the exception of Dickman's approximately 4-week stint of construction work for Callie in first and second quarter 1978, Dickman's actual employment was either short-lived, sporadic, and/or for rates of pay substantially below that which he received from Respondent. This at least *suggests* that he was not trying hard to find work—let alone work "comparable" to that which he performed at Respondent's plant. I note moreover the testimony of TEC Representative Mateck that the Houston area TEC office had a "difficult time filling all of the helper-type or laborer-type orders that we receive [throughout the backpay period]." The latter types of jobs were, I find, comparable to the one which Dickman had performed for Respondent. In this regard, Dickman never affirmatively testified that he registered with the TEC as a means of finding work. Instead, when directly asked if he had so registered, he replied:

> The—ah—my—I believe my only contact with the Texas Employment Commision [sic] as far as I can remember, was in connection with the job for Kelly [sic] Construction.

This testimony may imply that he had preregistered with TEC, but, if so, I would have expected Dickman to say so plainly. Asked whether, after finishing work with Callie Construction, he went back to the TEC, he replied: "I believe so; yes sir." Again, Dickman's equivocal response is suspicious.

[53] Asked if he liked to play the guitar, Dickman replied: "I like to play it; wish I could play it better." Asked what eventually became of his musical work, Dickman replied: "[T]he club owner just backed off. I guess I was chasing everybody away." Dickman elsewhere described his guitar playing as a "hobby" and disclaimed any professional musical aspirations.

[54] He quit because the work was hot and unpleasant, because his pay was low, and because he "thought slavery went out a long time ago."

[55] This is the correct spelling of the company as shown on its report to the compliance officer. In the transcript, it is rendered as "Kelly." In the backpay specification, it is rendered as "Callie."

[56] Reflective somewhat of Dickman's vagueness and unreliability of recall, he estimated that he worked a total of between 1 and 2 months for Callie, plus an additional week after being off for 2 weeks. In fact, dividing his total earnings by his claimed hourly rate reflects that he worked, at most, something less than 4 full weeks for Callie.

Dickman was furnished periodically by the compliance officer with a "backpay data sheet" in which he was to report information pertaining to interim earnings, job searches during the reporting period, and related information. He submitted only one such sheet[57] on October 22, 1976.

There, he reported as interim earnings only the amounts received as a "freelance musician self-employed." There are no entries in the space calling for a listing of "efforts to seek employment since discharge." From this, I infer that at least for the period between his discharge and October 22, 1976, he made no comparable job searches of any kind. In other words, this document impeaches his claim from the witness stand that he was looking for work during that period.

The record also reflects that the Union's International representative, L. Q. Black, made several continuing efforts to steer discriminatees to jobs after their unlawful discharge by Respondent.[58] He testififed that he held periodic meetings with discriminatees for this purpose and particularly recalls that two refineries in the area, Sheel and Ethyl, were hiring "general helpers" in 1976 who, after 6 weeks' training, would be assigned to various crafts within the refineries. These were union-represented jobs and paid as starting wages about $7.25 per hour (i.e., more than Dickman's rate as of his termination by Respondent) and increased throughout the backpay period to rates higher than those paid for similar work at Respondent at any given time. Dickman stated that he was unaware of any of the Union's efforts to assist the discriminatees in finding comparable work, that he did not know who Black was, and that he never attended any of the meetings held by Black.

No single circumstantial factor cited above is sufficient, standing alone, to justify the conclusion that Dickman failed to seek suitable interim employment. Taken as a whole, however, and considering Dickman's evasive and highly generalized testimony about his job searches, these factors support the conclusion that Dickman did not, in fact, make serious efforts during most of the backpay period to find interim employment in work which was comparable to that he performed for Respondent. Hardly any other discriminatees had the same poor results from alleged job searches as Dickman experienced.[59] The nature of the work that he did choose to take (in those relatively infrequent periods within the approximately 31-month backpay period when he was actually employed) reflects his disposition to avoid comparable industrial work. Accordingly, his testimony that he regularly sought comparable industrial work and that he had "applications everywhere" is not believable and I do not credit it.

Pulling together all of the foregoing, I reach these ultimate conclusions:

From his discharge until he took the Callie Construction job, Dickman was unreasonably and willfully avoiding employment opportunities in jobs comparable to the millwright-helper job he had with Respondent. Accordingly, Respondent's gross backpay obligation for most of that period was tolled.

The record does not show precisely when Dickman took the Callie job in first quarter 1978, nor precisely when he left that job in second quarter 1978. Since it appears that he took one other job in first quarter 1978 which paid as much as he would have earned at Respondent (i.e., Crown-Vee), and since it appears that he quit that job reasonably out of concern for extraordinary hazards, I find, resolving ambiguities in his favor, that he was "in the comparable labor market" throughout first quarter 1978. Accordingly, I sustain the net backpay figures for that quarter which are set forth in the specification ($4,126).

Since I do not find that Dickman made any serious job searches in the comparable labor market after his layoff from Callie, I conclude that Respondent's backpay obligation was again tolled from that point through the balance of the backpay period. I infer that Dickman's $875 in earnings from Callie in second quarter 1978 at an average rate of $8.70 per hour reflects that he worked 100 hours for Callie in that quarter. I therefore further infer from the foregoing that he left Callie in mid-April 1978. During that period, his gross backpay from Respondent for 100 hours of work would have been $854.50.[60] In short, his actual earnings more than offset his putative earnings at Respondent, yielding zero net backpay for that period (and no further backpay thereafter because of his failure to seek comparable work thereafter).

Accordingly, Respondent owes him net backpay only for first quarter 1978 in the amount of $4,126, exclusive of interest. In addition, Respondent owes him an unliquidated amount of wage differential payments after his reinstatement at an improperly low rate. Since this postreinstatement discrimination was shown to be continuing even to the present, I recommend that Respondent be ordered to make Dickman whole in this area by paying him what he would have received but for Respondent's failure to give him "service" credit for the period that he was out of work after his unlawful discharge to the point of his reinstatement.[61]

8. James L. Ellis

The General Counsel claims for Ellis a total of $23,031. Included in this figure are special claims for expenses incurred in obtaining interim employment, or for additional mileage involved in driving to interim employers' premises, and medical insurance premium costs and unreimbursed medical expenses which would have been provided without cost under Respondent's medical insurance program. All of these "special" claims were duly

[57] G.C. Exh. 3(G)(1).

[58] Black testified, and I find, that all of the discriminatees herein were members of the Union's Local 4-367.

[59] And compare any discussion of Lopez, *infra*, who is treated differently.

[60] Employing the formulas in the backpay specification which I have previously concluded were validly derived.

[61] Since this is not likely to be a huge amount, I trust that the parties will have no difficulty in reaching an agreed-upon and appropriate liquidated figure. Absent agreement, supplemental proceedings may be required, but there is no need to delay the disposition of the other claims in this case pending the outcome of dealings between the parties as to the Dickman wage differential issue.

proved by the General Counsel and Respondent did not specifically contest them.

On brief, Respondent includes Ellis in the "catch-all" category discussed above in connection with Burleson. In other words, there is no specific claim, nor was there evidence to support such a claim, that Ellis failed to mitigate Respondent's backpay liability.

Having rejected Respondent's "catch-all" defenses, I therefore sustain the backpay specification as to Ellis in its entirety. Respondent owes him, exclusive of interest, $23,031.

9. William Fairless

Apart from specific numerical differences, Fairless' claims are essentially the same in character as those made for Coryell, *supra*. Like Coryell, Fairless initially left a job in California to take a position with Respondent. Like Coryell, Fairless initially took an interim job in Houston after his unlawful termination by Respondent in order to earn enough to pay the costs of moving back to California. Like Coryell, upon his return to California, Fairless promptly obtained comparable interim employment which substantially offset Respondent's gross backpay liability. By first quarter 1977 and continuing thereafter, Fairless' job in California virtually extinguished any continuing backpay liability.

Respondent raises the identical defenses to Fairless' claims as it did in the case of Coryell. I reach the same conclusions, and therefore sustain the backpay specification with one minor exception. In the specification, it was alleged that Fairless incurred expenses associated with his return to California totaling $1,080. At the hearing, Fairless testified, with supporting documentation, that his expenses actually totaled $1,269.98. I therefore agree with the General Counsel's contention on brief that the latter figure should have been deducted from Fairless' interim earnings during the same quarter. Doing so results in an upward revision of net backpay for that quarter from $3,081 to $3,271 and an ultimate upward revision in overall net backpay from $10,746 to $10,936. Respondent owes him that latter figure, exclusive of interest.

10. Alan E. Fowler

The General Counsel claims for Fowler $9,523, including the proven cost of insurance premiums which Fowler paid after his discharge in order to maintain coverage comparable to that provided gratis by Respondent.

There is a somewhat unique wrinkle to Fowler's case. He had been an employee of Houston Light & Power Company since 1972. He happened to be working at Respondent in the summer of 1976 because there was then a strike at Houston Light which lasted until September 26 and he needed employment while on strike. He returned to Houston Light after he had been unlawfully discharged by Respondent and after the Houston Light strike was settled.

Respondent appears to make two defensive claims: First, that Fowler was never a bona fide employee of Respondent, but instead remained an "employee" of Houston Light even while working for Respondent. Accordingly, he should not receive any backpay. Alternatively, Respondent contends that for at least that period after he was discharged from Respondent until he returned to Houston Light after the strike settlement (i.e., between August 25 and September 26, 1976) he should be treated as having willfully avoided interim earnings because he honored the picket line at Houston Light.

The first contention must be dismissed *pro forma*. Fowler's employee status, his right to a reinstatement offer from Respondent, and his attendant right to backpay were the subjects of litigation in the underlying proceeding. The facts pertaining to Fowler's status and the circumstances of his taking employment with Respondent were known or knowable to Respondent at the time and should have been offered then if Respondent wished to resist an order of reinstatement for Fowler. Fowler was included in the Board's Order of reinstatement which the Fifth Circuit enforced. Accordingly, that question is *res judicata* and may not be litigated at the compliance stage.

Moreover, on the merits, Respondent did not establish that Fowler would have returned to Houston Light after the strike settlement even if it had never unlawfully discharged him. For all that this record shows, Fowler might have preferred to remain in Respondent's employ even though he initially obtained a job with Respondent only because he needed earnings during the Houston Light strike. Respondent's unlawful discharge of Fowler made it impossible for Fowler to make the choice.

As to the second contention, I likewise reject it. If it is a part of the duty to mitigate to obtain comparable employment in an industry which pays rates similar to those paid by the wrongdoer employer, one must accept as a corollary that, when employees in that interim employing industry go on strike, it would be unreasonable to require a discriminatee to behave differently from those of his fellow employees on the same job. The duty to mitigate has never been held to encompass a duty to engage in strikebreaking. One of the risks assumed by an employer who unlawfully discharges an employee is that the employee will have to make choices about how, and under what circumstances, he will take interim employment while awaiting reinstatement by the wrongdoer. Where, as here, it was ultimately in Respondent's interest for Fowler to have taken a substantially offsetting interim job with Houston Light, Respondent's backpay liability may not be tolled by those periods in which, due to the strike, Fowler was required to absent himself from work.

Accordingly, I sustain the backpay specification as to Fowler. Respondent owes him, exclusive of interest, $9,523.

11. Robert M. Fox

The General Counsel seeks for Fox net backpay of $7,078. The only specific defense raised by Respondent in Fox's case is that he unreasonably quit a "suitable" interim job for Upjohn Co. in second quarter 1977 and, therefore, any subsequent differences between interim earnings and what he would have received from Respondent were "willfully self-inflicted."

I find and conclude as follows: Fox, a journeyman electrician for Respondent, obtained another journeymen electrician's job at Upjohn's union-represented plant shortly after his discharge by Respondent. He continued working at Upjohn until late second quarter 1977. During those periods, his earnings at Upjohn were, for the most part, about $1,000 per quarter less than he would have received at Respondent. He quit Upjohn in a dispute immediately growing out of his failure to receive a wage increase to the top rate due to Upjohn's having inserted an additional wage progression "layer" between his starting rate and the top rate. He was also concerned about handling hazardous chemicals on that job and was further nursing an abiding grievance over Upjohn's failure to compensate him for a brief period of time off which Upjohn had forced him to take in connection with what he believed to have been a job-related injury.

Only shortly after quitting at Upjohn, however, Fox obtained a job with Technical Maintenance, Inc., at which he earned at least as much as he had with Upjohn.[62] He later quit Technical Maintenance to take an even better paying job with Soltex Polymer (without any hiatus between the two jobs). In three of the quarters in which he worked at Soltex, his net backpay was zero; in the other two quarters his net backpay was less than $150 in each quarter.

Considering all of the foregoing, Fox's decision to quit Upjohn for the reasons he stated does not amount to an intentional or willful failure to mitigate Respondent's backpay liability. It is one thing for an employee cavalierly to quit a substantially offsetting interim job under circumstances suggesting a desire to have his idleness subsidized by the employer who wrongfully discharged him. It is quite another thing to quit a "comparable" interim job due to dissatisfaction with conditions on that job and under circumstances where other, more acceptable positions are available which will have the same, or greater, backpay-mitigating features than the interim job from which the employee quit. Fox's behavior clearly falls into the latter category. His quitting at Upjohn did not have any demonstrable adverse impact on Respondent's subsequent net backpay obligation. To the contrary, as shown above, his quitting enabled him to take subsequent employment which benefited Respondent from the standpoint of net backpay owed.

There being no other contested features of the backpay claim for Fox, I therefore sustain the backpay specification. Respondent owes Fox, exclusive of interest, $7,078.

12. Kenneth Gatlin

The claim for Gatlin ($13,826) is affected substantially by his failure to obtain earnings, except from self-employment as a television, radio, and appliance repairman, from third quarter 1976 through first quarter 1978. Respondent contends that his "self-employment" was casual and, therefore, did not represent a bona fide effort to mitigate damages, thus warranting a tolling of Respondent's backpay obligation throughout the above-mentioned quarters. Respondent does not claim that Gatlin's employment after first quarter 1978 was unsuitable or that, during that period, he was willfully idle.

I find and conclude as follows: Gatlin was an electrician's helper at Respondent at the time of his wrongful discharge. He registered with TEC promptly after his discharge and followed the newspaper "want ads." He pursued several leads to jobs provided by TEC, but failed to be hired for any of them.[63] He also followed up on unpublished job possibilities suggested by friends and relatives. He eventually obtained his concededly suitable job with Gray Tool Company through this latter referal source.

Gatlin admittedly failed to follow up on two job possibilities in 1977 as a sales representative for the Coca-Cola Company and for an unnamed tobacco company. He ruled those jobs out (without ever having been offered either one) because he had no background in sales work and did not feel that he had any particular aptitude for sales. He also pursued a job opening for an electrical motor repair business seeking a skilled or journeyman electrician, but he was not hired. He presumes that this was because that job paid only $3.50 per hour and the employer must have assumed that he would be unwilling to accept it since Gatlin's application for that job showed that he had earned over $6 per hour while in Respondent's employ.

I conclude that Respondent has failed to meet its burden of showing that Gatlin was willfully or intentionally idle during the period before he obtained suitable work at Gray Tool. Rather, the record affirmatively shows that Gatlin made regular and reasonable efforts to obtain comparable employment, but without success.[64] The fact that he obtained some offsetting earnings through the performance on a casual basis of appliance repair work during the period before he started at Gray Tool cannot be cited as evidence of willful idleness. There was no showing that Gatlin *limited* his efforts to obtain earnings to those he might receive from such self-employment as an appliance repairman. To the contrary, he affirmatively sought other work during the same period and, as he testified, he would have preferred not to have had any idle time to devote to self-employment. Neither did Respondent show—or attempt to show—that Gatlin could have earned more than he actually did from his home-based and sporadic appliance repair work.

Accordingly, I sustain the backpay specification as to Gatlin. Respondent owes him, exclusive of interest, $13,826.

[62] I.e., the net backpay claimed for the full quarters in which he worked at Technical Maintenance was $506 in third quarter 1977 and $1,205 in fourth quarter 1977—averaging less net backpay per quarter than the average quarterly net backpay to which he was entitled during the period of his Upjohn employment.

[63] He specifically recalled applying for positions at Shell and Goodyear which would have paid him wages roughly comparable to those he would have received at Respondent, but he failed to be hired because he could not pass entry level tests.

[64] "The principle of mitigation of damage does not require success; it only requires an honest, good faith effort . . . ." *N.L.R.B.* v. *Cashman Auto Company and Red Cab Company*, 223 F.2d 832, 836 (1955).

13. Thomas W. Hurt

The General Counsel seeks for Hurt a total of $4,789.[65] Respondent's only challenge is that Hurt formed the subjective intention not to return to Respondent, but, instead, to make a career out of his interim job with Zapata Off-Shore Co., Inc.[66]

Hurt testified somewhat to that effect, i.e., that when he took the interim Zapata job in second quarter 1977, he decided that his "future" was "brighter" with Zapata "than it was with [Respondent]." He also testified that, when he started with Respondent, he likewise believed that Respondent offered "a job with a future," and that he had hoped to make a "career" with Respondent.

I note that, when Hurt began working for Zapata in early 1977 (at which time he allegedly subjectively abandoned any further interest in Respondent as a "career"), Respondent had not yet made any reinstatement offer to Hurt, nor had the Board even entered a reinstatement order in his favor. Hurt's testimony as to his subjective intentions at the time therefore does not establish any conscious or knowing waiver of the potential right to reinstatement.

In accordance with the policies emphasized in *Heinrich Motors, supra,* and for reasons essentially the same as those relied on in rejecting similar contentions raised by Respondent in the Coryell and Fairless cases, *supra,* I reject Respondent's claim as to Hurt. Respondent owes him $4,789, exclusive of interest.

14. Lee T. Judd

The total claim for Judd was originally $11,840, including a special expense claim of $464 for tools which he purchased in connection with his work for an interim employer. In addition, the total claim is affected by certain mileage expenses incurred either in searching for work or in traveling to jobsites which were more distant from his residence than Respondent's Bayport plant was. Finally, the total claim is affected by an alleged $991 in "insurance premium" claims similar to many of those previously discussed.

With the exception of the insurance premium claim, the other special expense claims are supported by evidence introduced by the General Counsel. The General Counsel concedes on brief that the insurance premium claim was not substantiated and, accordingly, that Judd's net backpay should be appropriately reduced to $10,849. I agree that the $991 insurance premium cost was unproved and therefore that Judd's net backpay must be reduced by that amount. The balances of the special claims were not disputed in any of Respondent's various answers, nor are they addressed in Respondent's post-trial brief. I therefore sustain them.[67]

Respondent's sole defense raised on brief is that Judd, a pipefitter by trade who also held a pipefitting job with Respondent, eventually left that trade to take a sales job at a Sears, Roebuck & Co. retail store. This choice, admitted by Judd to have been a "change in vocation," assertedly caused Judd to abandon any search for work in jobs comparable to those he performed for Respondent. Accordingly, argues Respondent, Judd should not be entitled to any backpay differential after taking the Sears job in sales.

This defensive contention would have greater force had Respondent demonstrated that Judd's choice to take work at Sears was made in preference to some other available pipefitting job and/or what Judd's earnings at Sears were substantially less than he would have earned in the pipefitting trade. Neither point was established by Respondent, however.

The record is clear that Judd was involuntarily laid off from his job at Brown & Root and was therefore required to reenter the job market. There is no indication that other pipefitting work was available to Judd at this time (second and third quarters 1977). It may also be observed that the pipefitting trade—at least for such contractors as Brown & Root, if not generally—yields noncontinuous employment, and necessarily involves periods of no earnings due to layoffs when specific construction or maintenance projects are curtailed or terminated.[68]

Accordingly, the choice to abandon the pipefitting trade in favor of steady work at an employer, such as Sears, which may pay less per hour than a pipefitter might receive when employed,[69] is not necessarily a willful choice to forgo potential earnings. Indeed, with the exception of the first two quarters of his employment at Sears (fourth quarter 1977, first quarter 1978), Judd's subsequent earnings from Sears in the final five quarters of the backpay period were more than sufficient to offset Respondent's gross backpay obligation, and equaled or exceeded the quarterly earnings which he had previously received from Brown & Root.

Accordingly, Judd's choice to leave the pipefitting trade in favor of a steady job at Sears neither prejudiced Respondent from a backpay standpoint nor, in the circumstances, did it reflect a willful failure to mitigate Respondent's backpay liability.

[65] This includes $4,463 in basic backpay, plus $223 in insurance premium costs to maintain coverage comparable to that provided gratis by Respondent, and $103 in unreimbursed medical costs which would have been covered by Respondent's insurance plan. These latter "special" claims are supported by evidence introduced by the General Counsel.

[66] As noted above, Hurt's testimony was taken through deposition after the record in the hearing had otherwise closed and after Hurt had returned to the United States from hospitalization in the Far East.

[67] As to the $464 tool expense, the validity of the claim is questionable in the light of Judd's concession that the tools which he bought were not required as a condition of employment by the interim employer (Brown & Root, Inc.). Rather, Judd admittedly took it upon himself to buy them because notwithstanding assurances by Brown & Root's superintendent that adequate tools would be made available, Judd found that "they just didn't have the tools to do the job correctly." Especially where the tools have resale value there is doubt in the law whether the costs may be treated as an offset to interim earnings. *Aircraft and Helicopter Leasing and Sales, Inc.,* 227 NLRB 644 at 648 (1976), and cases cited. Where, however, Respondent neither formally contested the tool expense claim in Judd's case, nor sought to rebut his testimony that the tools were needed at Brown & Root even though not required, there is no basis for disallowing that specific claim in the backpay specification.

[68] For example, Respondent's counsel himself elicited testimony from Judd to the effect that the amount of maintenance work performed by Brown & Root constantly fluctuates and the number of employees needed at any given time likewise fluctuates.

[69] The record does not show how much per hour Judd earned at Sears.

Respondent therefore owes Judd, exclusive of interest, $10,849, the revised amount claimed by the General Counsel.

15. Louren Lee Lamb

The backpay specification alleged that Lamb is owed $11,310—a figure which is affected by a claim for mileage expenses of $150 in connection with his search for interim employment in third quarter 1976. Both the General Counsel and Respondent agree on brief that Lamb's testimony supports only a claim of $37 for this expense. There are no other defenses specific to Lamb raised by Respondent. In accordance with the General Counsel's concession that the mileage claim was overstated in the specification, and that $37 is the correct expense claim here, I have reduced the net backpay appropriately. Respondent owes Lamb, exclusive of interest, $11,197.

16. Daniel G. Leggett

In the backpay specification, the claim for Leggett was $14,834, plus $7,802 in unreimbursed medical expenses. The medical expenses were supported by testimony and documentation and would have been covered by Respondent's group medical policy had Leggett not been wrongfully discharged.

Respondent does not raise any specific defensive claims as to Leggett. Rather, he is treated in Respondent's brief as being in the "catch-all" category of discriminatees as to whom the only defenses are the general ones which I have previously rejected (see discussion of Burleson, *supra*).

The General Counsel concedes, however, on brief that Leggett's testimony about certain work which he missed due to his wife's illnesses during third quarter 1977 and fourth quarter 1978 requires some modest downward adjustments from the computations in the backpay specification for those quarters. I approve of the method employed by the General Counsel in making those revisions[70] and I therefore conclude that Respondent owes Leggett net backpay, exclusive of interest, of $21,241.

[70] The General Counsel (br., p. 21) employed the following computation:

> Leggett further acknowledged that there were two occasions when due to his wife's surgery he did miss some time, eight or nine days the first time and approximately four days the next time. The surgery on the first occasion was in the month of July 1977 and on the second occasion the month of November 1978. Accordingly, the computations made through the third quarter of 1977 are adjusted under the column of gross backpay by taking the 200 hours now appearing and substituting 160 hours. The result in computations reveal that the total aggregate is $1578.00 rather than the $1973.00 now claimed. The adjustment thereby for the total gross backpay is $5013.00 rather than the $5408.00 now appearing. The net backpay figure then becomes $1696.00 rather than the $2091.00 now appearing under the net backpay calculation. Similarly for the Fourth Quarter of 1978, the second calculation made under the gross backpay becomes 120 hours resulting in the figure of $1265.00 rather than $1687.00 now appearing. Accordingly, the total gross backpay is adjusted to $5015.00 rather than the $5437.00 now appearing but the net backpay figure is still -0-. Thereby Leggett is entitled to $13,439.00, exclusive of interest, plus his substantiated medical expenses of $7802.18, equalling $21,241.00.

17. Jesse Lopez

Based on additional interim earnings reported by Lopez after the initial backpay specification had issued, the General Counsel issued a written amendment to the specification (G.C. Exh. 2) which reduced the total backpay claim for Lopez from $39,399 to $37,241. In addition, it was alleged and proved that Lopez incurred unreimbursed medical expenses which would have been covered by Respondent's group medical policy in the amount of $342, bringing the total claim on his behalf to $37,763. Finally, it was alleged that Lopez (who accepted Respondent's offer of reinstatement) was reinstated at an incorrectly low rate.

As to the latter issue, it is essentially moot due to the fact that Lopez quit after working only 1 day at Respondent. The difference between what he allegedly should have received for that 1 day and what he actually received is so slight (less than $2.50) that I treat this matter as *de minimis* and will not address it further.[71]

The main defensive contention raised by Respondent as to Lopez is that his employment was so sporadic and unproductive of earnings during the backpay period that the inference should be drawn that he was willfully idle and therefore not entitled to any backpay.

I find and conclude as follows: Lopez had interim earnings from three sources in the backpay period. In fourth quarter 1976 and first quarter 1977 he worked at F. W. Woolworth Co., and earned a total of $1,895. In first quarter 1977 through nearly the end of fourth quarter 1977, he was employed as a railroad switchman at Galveston Wharves and earned a total of $5,042.[72] As is reflected in the pre-trial amendment to the backpay specification, he earned an additional $1,978 in first quarter 1978 from some unspecified work for a Galveston home restoration company (Klos). Thereafter, from at least April 1978 until backpay was tolled in April 1979, he obtained no interim earnings whatsoever.

Lopez' specific job classification while employed at Respondent is not a matter of record, but from the fact that he was earning $5.70 per hour when he was discharged by Respondent, I infer that he was in a relatively unskilled "helper"-type job there. Because Respondent failed to show that Lopez' hourly rates of pay in his jobs at Woolworth, Galveston Wharves, and Klos were less than the rate he received from Respondent,[73] I am unable to accept Respondent's assertion that those three jobs were not "substantially equivalent" to the job from which he was wrongfully discharged.

[71] The approach taken by the General Counsel as well, his brief being silent on this matter.

[72] He was laid off from the railroad job in December 1977 and did not return there until August 1979, after the close of the backpay period.

[73] Lopez testified that he was not certain whether the Woolworth job paid "four-something an hour" or "a hundred and twenty-five a week." Considering Respondent's burden here, I resolve the ambiguity by finding that his hourly rate at Woolworth was "four-something." Resolving the remaining ambiguity against Respondent (who, presumably, had access to sources at Woolworth which could have furnished reliable figures) I infer that Lopez' hourly rate was sufficiently close to his hourly rate while at Respondent so as to render that employment substantially comparable.

Accordingly, inasmuch as Lopez was fairly regularly employed between third quarter 1976 and first quarter 1977 at jobs which were not shown to be significantly different (from an hourly rate standpoint) from his job at Respondent, I find that Respondent has failed to show that Lopez was willfully idle or was avoiding more lucrative employment during those quarters. I therefore conclude that he is entitled to the full net backpay claimed for those quarters in the backpay specification, as amended.

A more substantial question is presented by Lopez' failure to be gainfully employed at all in the approximately 12-month period following his last employment at Klos. Lopez' testimony about what he did to obtain employment was perfunctory and general in character. This is the extent of his testimony about what he did after the Klos job was completed in April 1978:

> A. I went to the Railroad Retirement Board and filed for my unemployment.
> Q. Did you do anything else?
> A. I've looked for jobs.
> Q. Like—how'd you do it?
> A. In the paper and I had to go to the [TEC].

There are, however, substantial and detailed reports filed by Lopez with the compliance officer showing the names, dates, and surrounding details of scores of efforts made by Lopez to obtain jobs in industrial and petrochemical plants in the Houston and Galveston area throughout the backpay period.[74] These were received at the outset of the hearing without objection and without any statement of their purpose of relevance. I am mindful that they are not reliable substitutes for firsthand testimony, but, in view of their existence, I am not willing to treat Lopez' perfunctory testimony about his job searches as suggestive of a failure to engage in bona fide searches.[75]

I therefore credit Lopez in his testimony that he engaged in job searches throughout the backpay period. In the absence of any clear evidence that Lopez turned down or otherwise failed to avail himself of demonstrated employment opportunities, I therefore conclude that his 12-month period of unemployment was not willfully incurred.

Accordingly, I sustain the amended backpay specification as to Lopez. Respondent owes him, exclusive of interest, $37,763.

18. Richard McBride

The General Counsel claims, exclusive of interest, $16,301, including $748 in "insurance premium" costs expended to maintain insurance comparable to that provided by Respondent. The record supports this latter claim. Respondent interposes no specific defenses, but includes McBride in the "catch-all" category previously discussed. Having previously sustained the *Woolworth* and "Brown & Root replacement" formulas used in determining backpay, I sustain the specification. Respondent owes McBride, exclusive of interest, $16,301.

19. Stephen Ray McKnight

The General Counsel initially claimed for McKnight $12,491. On brief, the General Counsel concedes that this figure is too large since it wrongly included "additional mileage" for periods after McKnight had changed his residence to be closer to an interim employer. Based on McKnight's testimony, the General Counsel concedes that the additional mileage claim in the specification should be reduced from $480 to $176 in third quarter 1978 and the $480 in fourth quarter 1978 should be stricken, resulting in appropriately reduced net backpay for each of those quarters and a revised total net backpay of $11,707. I agree that the downward revisions acknowledged by the General Counsel are appropriate.

Respondent's sole argument relating specifically to McKnight is that he quit a "suitable" interim job at Oxirane in order to try construction work with his father, an unsuccessful enterprise which yielded him smaller interim earnings than if he had stayed at Oxirane. Respondent therefore would have me toll backpay for McKnight as of his quitting at Oxirane in third quarter 1978.

I find and conclude as follows: McKnight had been an instrument technician with Respondent and took a similarly named job with Oxirane where he stayed for about 20 months, receiving substantially offsetting interim earnings. He quit that job finally because it was "cross-craft," that is, it involved both instrumentation and electrical work. McKnight's particular concern was the electrical portion of the work at Oxirane, which required working with high voltage. At Respondent, he had occasionally done some routine electrical work involving systems that carried no greater than 110 volts, or normal household voltage. At Oxirane, there were systems carrying between 440 and 2,100 volts.

Respondent has failed to meet its burden of showing that McKnight's decision to quit at Oxirane was unreasonable and/or that it amounted to a willful avoidance of interim earnings at a job "comparable" to McKnight's job at Respondent. McKnight's job at Oxirane was significantly different from his job at Respondent in that the Oxirane job involved more hazardous work with high voltage equipment. Accordingly his backpay rights were not tolled by his decision to leave Oxirane in favor of construction employment in a small company formed by his father.

Neither was his choice to work for his father's construction firm an unreasonable one. He was guaranteed a minimum of $8 per hour on that job with the additional possibility of sharing in profits if sufficient work orders developed. At the time (April 1978), residential construction looked like a promising employment opportunity. That residential construction later fell off and the business never became significantly profitable does not show that McKnight's decision to enter that field was an intentional choice to avoid offsetting interim earnings. I note further that McKnight did not linger unduly in what was proving to be an unrenumerative venture. He subse-

[74] G.C. Exh. 3(q), pp. 27-37.

[75] Compare my treatment of Dickman, *supra*, whose testimony about suitable job searches was similarly perfunctory, but who submitted only one quarterly reporting form to the compliance officer and who failed to indicate on that one from any job searches whatsoever.

quently quit working for his father in late fourth quarter 1978 and immediately obtained employment with Celanese Corporation which yielded substantially offsetting interim earnings thereafter.

Accordingly, McKnight's backpay was not tolled when he quit Oxirane. Respondent owes him, exclusive of interest, $11,707.

20. Robert Molis

The claim for Molis is $2,988. He had substantially offsetting interim earnings throughout the backpay period. Respondent raises no specific defensive claims in Molis' case. Rather, he is part of the "catch-all" group previously referred to.

Having sustained the General Counsel's formulaic approach, I sustain the backpay specification. Respondent owes Molis, exclusive of interest, $2,988.

21. Robert Rhoades

The initial claim for Rhoades was $44,836. Before the hearing, however, Rhoades reported additional interim earnings and the specification was amended, as is fully set forth in General Counsel's Exhibit 2, to reduce the net backpay claim to $20,724. In addition the amendment averred that Rhoades paid out $575 in premium payments in order to maintain insurance coverage which Respondent provided without charge under its group insurance program. The total claim for Rhoades is, therefore, $21,299. The additional premium cost was established through competent evidence.

Respondent points to the fact that Rhoades' first interim job in fourth quarter 1976 until early second quarter 1977 was with a dry wall firm which paid about $2.50 per hour, whereas he had been receiving $5.50 as a utility maintenance man at Respondent before his discharge. In addition, Respondent points to the fact that the interim job which Rhoades took through the balance of the backpay period paid only $3.25 or $3.50 per hour and increased into the $6 range only recently. From this, Respondent argues that Rhoades never sought "suitable" interim employment and therefore should not be entitled to the difference between what he did earn and what Respondent would have paid him.

I reject Respondent's position. Respondent did not demonstrate that there were better paying interim jobs which Rhoades turned down or avoided. Since he was occupied on a virtually full-time basis in his interim work, I have to assume that he was engaged in a good-faith effort to mitigate Respondent's liability, but was unable to find better paying work.[76] Respondent therefore owes Rhoades, exclusive of interest, $21,299.

22. Michael Robb

The net backpay claim is $10,582. Respondent argues that Robb willfully quit or was fired from a series of jobs beginning in first quarter 1977 and therefore Respondent's backpay obligation was tolled from first quarter 1977 through the balance of the backpay period.

I find and conclude as follows: Robb quit an interim job as a mechanic at Goodyear Tire & Rubber Company when he was required to work a straight graveyard shift schedule. He had hired in there with the expectation that such a schedule would not be necessary since there were three other mechanics with whom to share the graveyard shift assignments. One of them was later fired, requiring Robb to work exclusively on graveyard shift. He had not worked such a schedule at Respondent, except infrequently, when, for example, there was need for a maintenance "turnaround."

I conclude that it was not unreasonable to quit Goodyear because of the uniquely undesirable nature of working a regular graveyard shift. Robb's duty to mitigate included a duty to seek and remain on interim jobs which were substantially comparable to the one he occupied before his unlawful discharge. The Goodyear job was sufficiently more onerous in its graveyard shift requirements to render reasonable his decision to leave it in favor of another job. Accordingly, I reject Respondent's contrary contention.

Thereafter, Robb worked for Brown & Root—first on a project at Oxirane Chemical until he was laid off there due to a reduction in force; later (through Brown & Root's referral) at Chocolate Bayou, some 50 miles from his residence. He took this job briefly until he located suitable employment. He quit the Brown & Root (Chocolate Bayou) job in third quarter 1977 in favor of a new position with Technical Maintenance, Inc. Both the Brown & Root and Technical Maintenance jobs were sufficient to yield entirely offsetting interim earnings in third quarter 1977. Thus, his decision to quit the former for the latter had no prejudicial impact whatsoever on Respondent's backpay obligation. Accordingly, I reject Respondent's claim that his quitting Brown & Root had any backpay-tolling effect.[77]

Robb was laid off from his job at Technical Maintenance in fourth quarter 1977 when it was discovered that his crew had little or no work to do. It appears that the crew had been sent to perform subcontracted maintenance work for a company identified only as "Lonzo" in this record. Lonzo had its own maintenance force and eventually decided that there was not enough maintenance work to justify subcontracting to Technical Maintenance. Since Robb was involuntarily laid off due to circumstances beyond his control, his resulting reduction in earnings, by definition, cannot be attributed to "willful" conduct on his part. Accordingly, I reject Respondent's contrary claim.

Robb obtained one brief construction job in fourth quarter 1977 shortly after being laid off by Technical Maintenance and then took a steady job through approximately the end of that quarter with Standard Maintenance Company. He was fired from that latter job. The only evidence of the circumstances of his having been fired is in his testimony below:

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[76] It would be perverse, indeed, to work full time at a low paying job when the same amount of work could yield higher pay elsewhere. Nothing in the record suggests such perversity in Rhoades' case.

[77] Even if his quitting Brown & Root (Chocolate Bayou) had in fact resulted in some loss of interim earnings, I would not find his decision to quit that job to be unreasonable in view of the fact that it involved a 100-mile-per-day round trip commute.

> A. Well, they told me that I was fired because I had my hands in my pockets, but I was trying to drum up a little business by myself.[78]
>
> A couple of other guys and I. I think they caught wind of it. I never did accept "cause I had my hands in my pockets for an excuse."

On brief, Respondent appears to accept Robb's supposition about the real reason why Robb was fired from Standard Maintenance. Respondent argues that Robb's "competing" with his employer was willful misconduct warranting denial of further backpay after his termination by Standard Maintenance.[79]

I conclude that Respondent has not met its burden of showing that Robb was fired by Standard Maintenance for willful misconduct. Assuming that Standard Maintenance fired Robb ostensibly for idleness on the job (hands in his pockets), Respondent had the duty of showing that the ostensible reason given was the true reason. Respondent clearly did not meet this burden; indeed, it abandons this contention in favor of the "competition" argument. This is so entirely speculative, however, as to be worthy of no weight in determining whether or not Robb's loss of that job was due to willful misconduct.[80]

I note, however, that Robb again obtained substantially offsetting interim work shortly after his termination by Standard Maintenance and throughout the balance of the backpay period. This is not the work pattern of a man who prefers idleness to gainful employment.

Accordingly, I conclude that Respondent failed to show that Robb was willfully responsible for any loss in interim earnings which he suffered as a result of any of his interim job terminations. Respondent owes Robb, exclusive of interest, $10,582.

23. Charles Rodriguez

The net backpay claim, as amended before the hearing, is $6,550.[81] Respondent offered no defense specific to Rodriguez. Rather, he is in the "catch-all" category previously discussed. Since I have rejected Respondent's formulaic defenses and have approved the formula used in the backpay specification to derive gross backpay, I therefore conclude that Respondent owes Rodriguez, exclusive of interest, $6,550.

24. Talmadge F. Smith

The net backpay claim is $4,202.[82] The claim for Smith is likewise the subject of only the "catch-all" defenses. Accordingly, having rejected those defenses, I conclude that Respondent owes Smith, exclusive of interest, $4,202.

[78] A "competitive" business, Robb acknowledged shortly thereafter.

[79] Resp. Br., p. 53.

[80] Cf., e.g., *Aircraft and Helicopter Leasing, supra*, 227 NLRB at 654, and cases cited.

[81] This includes $133 for "comparable insurance" premium costs. The latter amount was supported by Rodriguez' testimony.

[82] This includes $802 in "comparable insurance" premium costs and "additional mileage" costs (treated as an offset to quarterly interim earnings) of $292 per quarter. These special claims were supported by Smith's testimony.

25. Jeffrey D. Stevenson

The original backpay specification claimed $24,799 for Stevenson, and reflected that Stevenson was virtually without any interim earnings from the start of third quarter 1977 through second quarter 1978. Based on further information disclosed by Stevenson shortly before the hearing, the specification was amended as is reflected in General Counsel's Exhibit 2 to concede additional interim earnings between the start of third quarter 1977 and the end of second quarter 1978, thus reducing the total net backpay claim to $19,445. Developments at the hearing, particularly Stevenson's concession that he had yet additional, unreported, interim earnings from an additional, previously undisclosed employer (Brown & Root), have caused the General Counsel to concede on brief that the claim for Stevenson should be lowered further.

Preliminary Discussion

I begin this discussion with an observation about Stevenson's credibility. As I watched him testify, I formed the impression that he was regularly lying and/or evading. He pretended not to recall certain important events until pressed[83] and/or changed his testimony whenever it appeared that Respondent was about to impeach some earlier false statement which he had made.[84] Accordingly, I place little credence in his testimony except insofar as it contains admissions.

It ought to be made clear that there is no question of bad faith or complicity on the part of the General Counsel. To the contrary, the record reflects sincere and continuous attempts before the hearing by the compliance officer to develop accurate offsetting data (even though Respondent bore the ultimate burden in this area), and equal sincerity and willingness to give credit where due to Respondent on the part of the General Counsel's trial counsel.

It is regrettable that the compliance officer is not given a better lever to extract accurate data about interim earnings from coy discriminatees such as Stevenson, who obviously sought to conceal such earnings and who chose to reveal them piecemeal, only as it became clear that some additional earnings source had been discovered.[85]

It is clear that many backpay cases would never be tried if respondent parties could be assured that the General Counsel's interim earnings figures were reliable. Unfortunately, the bad faith of a few discriminatees, such as Stevenson, stands as an obstacle to voluntary settlement of backpay disputes. As herein, a hearing is sometimes necessary to obtain admissions from discriminatees which would further reduce the net liability from the figure

[83] See, e.g., his testimony pertaining to interim work with Brown & Root which he had concealed from the compliance officer until challenged at the hearing.

[84] See, e.g., his testimony regarding termination from H. B. Zachry.

[85] In fairness, most discriminatees are fully candid about their interim earnings and other questions of fact bearing on a respondent's net backpay liability. Normally, a failure to report the same does not derive from any intentional desire to enhance their net backpay, but rather from honest forgetfulness, especially where they have worked for many employers, often on a short-term basis, throughout a lengthy backpay period.

which the General Counsel is forced to claim based on the pretrial representations of the discriminatees.

The Board recently addressed this recurring problem in *Flite Chief, Inc.; Richard Miller and Karen Miller; M & M Truckadero Coffee Shop, Inc., James Miller and Paul A. Minder*, 246 NLRB 402 (1979). There, discriminatee Templeton waited until the day the backpay hearing opened to acknowledge to the Board that he had received substantially greater interim earnings from a variety of sources than he had previously admitted in regular reports to the Board's Regional Office. The Administrative Law Judge had observed in his decision "that it would be a salutary step in the administration of Board compliance proceedings to impose a penalty upon backpay claimants in order to discourage claimants such as Templeton from attempting to pervert a remedial order of the Board, issued in the public interest, into an unmerited personal gain." Accordingly, the Judge recommended:

> [W]here a backpay claimant wilfully conceals interim employment from the Board's compliance officer with an intent to fradulently increase the amount of backpay and does not reveal the concealed employment until after the issuance of a backpay specification, the claimant should be penalized by disallowing all backpay from the date the claimant was first employed by an interim employer whose earnings have been concealed until the claimant discloses those earnings to a representative of the Board.[86]

The Board disagreed with the Administrative Law Judge's recommendations as to Templeton. It concluded, from the evidence that Templeton had *voluntarily* (albeit at the 11th hour) disclosed the "missing information" and, therefore, the Board was unwilling to construe his behavior as evidencing fradulent intent "to pervert a remedial order of the Board . . . into an instrument . . . of personal gain."[87]

It is not clear from the Board's treatment of Templeton in *Flite Chief* exactly how the Board determined that Templeton's belated disclosure of additional interim earnings was "voluntary" nor, for that matter, is it clear how a test of "voluntariness" is to be applied to situations such as Stevenson's failure to disclose his Brown & Root employment until challenged by Respondent after he took the witness stand.

In my opinion, it would strain the definition of the term to describe as "voluntary" Stevenson's concession from the witness stand that he had also worked for Brown & Root. So far as this record shows, the information on which the General Counsel amended his backpay specification before the hearing as to Stevenson came from Respondent's amended and supplemental answer No. 4 in which Stevenson's interim earnings from postsecond quarter 1977 employment with H. B. Zachry Co. (previously undisclosed by Stevenson) were affirmatively averred. Presumably, Stevenson acknowledged this and the General Counsel accordingly amended the specification to reflect these additional earnings. It is questionable whether that latter acknowledgement could fairly be characterized as "voluntary," but I put that question aside. Stevenson's failure to report employment with Brown & Root, for whom he worked for the better part of several months, could scarcely be based on forgetfulness.[88] What seems clear is that Stevenson was waiting at each stage to determine what Respondent knew. When the postsecond quarter 1977 Zachry employment was ascertained before the hearing by Respondent, Stevenson admitted it. Similarly, when Respondent did not mention the Brown & Root employment before the hearing, Stevenson chose not to disclose it. It was only after Respondent indicated through questioning that it had evidence of the Brown & Root employment that Stevenson finally admitted to its existence.

If the "voluntary" nature of Templeton's 11th-hour disclosure about additional interim earnings in *Flite Chief* was the only factor which caused the Board to fail to apply the penalty recommended by the Administrative Law Judge, then it seems clear that the Board's ultimate holding in that cause does not bar the application of such a penalty to Stevenson herein. For the reasons noted above, Stevenson's grudging admission from the witness stand that he had also received substantial interim earnings from Brown & Root was not so much "voluntary" as it was compelled by the knowledge that he might be found guilty of perjury if he denied such employment.

Accordingly, I would apply to Stevenson the penalty suggested in *Flite Chief*. It being clear that Stevenson began his first stint of Brown & Root work of July 25, 1977,[89] I recommend, applying the penalty suggested in *Flite Chief*, that he be denied backpay for the period July 25, 1977, to January 30, 1980 (the date on which he finally admitted such employment).

Recommended Backpay Computation (With Penalty)

I adopt the net backpay figures alleged in the amended backpay specification through second quarter 1977 ($5,085). I reach the following conclusions about how much more net backpay Stevenson is entitled to up to the penalty cutoff date of July 25, 1977: There were 16 workdays (128 hours) between July 1 (the start of the third quarter) and July 25 (the cutoff date). Adopting the method for computing gross backpay used by the General Counsel in that quarter, Stevenson would have earned $6.45 per hour, plus a 17.01-percent overtime factor in the same period had he continued in Respondent's employ. Accordingly his straight time earnings in that period ($6.45 X 128) would have been $825.60. Overtime earnings in the same period would have been $140.43 (17.01 percent X $825.60). His total earnings (or gross backpay) in that period would therefore have been $966. However, it is apparent from the amended specification that Stevenson also earned $691 from U.M.C. Dart, Inc.,

[86] *Id.*

[87] *Id.*

[88] Indeed, Stevenson showed no difficulty in recalling the Brown & Root employment once Respondent's counsel brought it up.

[89] Note also that his conceded earnings from Zachry in third quarter 1977 were received after he left Brown & Root. (*Id.*)

in that same period.[90] Deducting from the gross backpay figure ($966) his admitted earnings from U.M.C. Dart ($691), in the same July 1-25 period, leaves a balance of $275 in net backpay for third quarter 1977 up to the penalty cutoff date.

Adding his accrued net backpay through second quarter 1977 ($5,085) and his net backpay for third quarter 1977 up to the July 25 cutoff ($275) yield $5,360. Respondent owes Stevenson this latter amount, exclusive of interest.

Alternative Computation (Without Penalty)

Should the Board decline to impose a penalty on Stevenson for his failure voluntarily to disclose his Brown & Root employment, it may be useful to avoid a remand to make alternative computations of Stevenson's net backpay. It should be noted at the outset that this is not a case like those discussed in *Flite Chief*[91] in which fradulent concealment of interim earnings has resulted in a denial of backpay where the concealment has made it *impossible* to ascertain the claimant's interim earnings. Indeed, as is discussed further below, Respondent had access to the data necessary to make such alternative backpay computations with precision, but chose not to make them a matter of record for the most part. Using available data from the record, and drawing appropriate inferences in the light of the respective burdens placed on the parties, I find as follows:

There is no contest over Stevenson's report interim earnings from the start of the backpay period through second quarter 1977. His employment in that period was largely with H. B. Zachry Co., although in second quarter 1977 he left Zachry to work most of that quarter at Dart Industries, Inc. In third quarter 1977, it was conceded in the initial specification that he had obtained interim earnings only from Dart. In the amended specification, it was further conceded that he had additional earnings from Zachry. At the hearing, as noted above, Stevenson was forced to concede that he had also worked in that quarter for Brown & Root. He admitted that he started with Brown & Root on July 25, 1977, and worked there at the rate of $5.50 per hour on a 40-hour weekly basis through August 4, 1977. There were 9 working days in that latter period and I therefore find that he worked 72 hours from Brown & Root between those dates at $5.50 per hour and thus earned an additional $396, bringing his total admitted earnings in that quarter to $1,718. Subtracting this figure from the gross backpay which Respondent owed him for that period ($4,192), I conclude that his net backpay for that quarter is $2,474.

The initial specification alleges that Stevenson had no interim earnings in fourth quarter 1977. The amended specification conceded that he had $1,063 in earnings during that period from Zachry. At the hearing, Stevenson again reluctantly admitted that, although he had not reported it before the hearing, he was reemployed by Brown & Root from December 21 through the balance of that quarter (December 31) at the rate of $5.94 per hour. He admittedly worked at least 40 hours per week and worked at least some overtime during that period ("not too much," according to Stevenson).

There were 8 workdays in the period December 21-31, 1977. Christmas fell on a Sunday and therefore does not affect this computation. Moreover, it appears from his equivocal testimony that, if he had a day off due to the holiday, it was paid. Finally, even if it was an unpaid day off, I ignore that out of a sense of equity. Since he admittedly performed some overtime work, this would likely offset any unpaid holiday day off. Accordingly, 8 days of 8 hours each at $5.94 per hour yielded him, I find, $380, in unreported interim earnings. Taken with the concession in the amendment that he earned $1,063 from Zachry in fourth quarter 1977, this brings his interim earnings in that quarter to $1,443, thereby reducing his net backpay entitlement for that quarter to $3,488.

The original specification likewise claimed that Stevenson had no interim earnings in first quarter 1978. The amended specification conceded $1,485 from Zachry in that quarter. Stevenson also admitted that he continued to work in that quarter for Brown & Root until he was admittedly discharged on February 3, 1978, for excessive absenteeism. Apparently, his earnings from Zachry in that period came from work after his discharge from Brown & Root. There were 25 working days between January 1 and February 3. Using an 8-hour day as a basis at $5.94 per hour, I find that he earned $1,188 in that quarter from Brown & Root. Added to his admitted earnings from Zachry during that quarter ($1,485), his total interim earnings were $2,673. This latter figure, subtracted from his gross backpay for first quarter 1978 ($4,446) yields an arguable net backpay of $1,773. However, had he continued to work for Brown & Root throughout the balance of first quarter 1978, rather than being discharged for excessive absenteeism, he would have had an additional 40 workdays after February 3, or 320 working hours at $5.94 per hour. Had he done so, his earnings for that final 40 days in the quarter would have been $1,900, rather than the $1,485 he actually received from Zachry during his post-Brown & Root employment in that quarter.

If Stevenson was discharged by Brown & Root for willful misconduct, then he should be presumed to have willfully avoided said additional $1,900 in potential earnings from that source in that quarter. I conclude that his "excessive absenteeism" amounted to such willful misconduct. His only explanation, a self-serving one, was that he was ill for several consecutive days and had called in sick to Brown & Root once, but abandoned further call-ins since his apartment had no telephone. Upon recovery from the illness, he states that he found that he had been fired by Brown & Root. This appears a flimsy and unlikely story—particularly in the light of Stevenson's tendency to conceal or distort the truth (and considering as well his termination from two subsequent em-

[90] He had been at U.M.C. Dart in the latter part of second quarter 1977 and I therefore infer that his employment there was continuous into early third quarter 1977.

[91] *M. J. McCarthy Motor Sales Co.*, 147 NLRB 605 (1964); *Jack C. Robinson, doing business as Robinson Freight Lines*, 129 NLRB 1040 (1960). Both of those cases involved concealed earnings from self-employment in nefarious or otherwise irregular business dealings where the only source of information about exact earnings would be the discredited backpay claimant.

ployers for the same "excessive absenteeism" which got him fired at Brown & Root). If he had no telephone, but was able to call to report his illness at least once, then it was unexplained exactly why he was unable to make subsequent call-ins as his illness persisted. Neither is it evident why he failed to make other arrangements to keep Brown & Root advised of his absence due to illness. I therefore conclude that Stevenson's own misconduct caused him to be fired by Brown & Root and that his potential earnings from Brown & Root—rather than his actual earnings from Zachry during the balance of first quarter 1978—are the appropriate measure of his interim earnings in that quarter.

Accordingly, since I have found that he earned $1,188 from Brown & Root before his discharge, and could have earned an additional $1,900 in first quarter 1978, I conclude that his constructive interim earnings were $3,088. Subtracting this figure from his gross backpay for that quarter ($4,446) yields $1,358—the net backpay figure which I conclude is the appropriate one for that quarter.

In the balance of the backpay period, it is conceded in the original and/or the amended specification that Stevenson had interim earnings as follows:

2d quarter 1978—$2,155 (Zachry)
3d quarter 1978—3,707 (Bowen Co.)
4th quarter 1978—2,923 (Bowen Co.)
1st quarter 1979—2,998 (Bowen Co.)
2d quarter 1979[92]—267 (Bowen Co.)

As noted above, Stevenson admits that he was fired by Zachry in second quarter 1978 for excessive absenteeism.[93] He also admits that he was frequently absent from work at Bowen Co., his ultimate employer, and that he quit Bowen Co. because he was about to be fired for excessive absenteeism and wished to avoid discharge.

It is not clear, however, whether his having been fired from Zachry in second quarter 1978 resulted in any net loss in interim earnings in that, or subsequent, quarters. This is because his hourly rate at Zachry is not a matter of record, nor is his hourly rate at his subsequent employer, Bowen Co., nor are the respective dates on which he quit Zachry and started at Bowen. Nor are similar relevant details relating to his termination at Bowen. In order to reduce its backpay liability, Respondent bore the burden of introducing this information. Respondent represented that it either had in its possession, or had access to, records which would reflect those details. The General Counsel offered to stipulate to whatever they would show, based on Respondent's representation. Leeway was allowed Respondent to present them at its earliest convenience.[94] Respondent did not follow through in any fashion. I therefore have no basis for inferring that Stevenson's discharge from Zachry and/or his quitting Bowen to avoid discharge had any prejudicial impact on Respondent's backpay liability.

It might be appropriate, in theory, however, to presume that Stevenson might have continued to work regularly for Brown & Root throughout the backpay period had it not been for his misconduct leading to his discharge from that employer in first quarter 1978. Thus, following the analysis used above in projecting his Brown & Root earnings through the remainder of first quarter 1978, a similar projection could be made through the end of the backpay period which could well result in substantially greater constructive interim earnings than those which he admittedly received from subsequent employers—all having the ultimate effect of further reducing Respondent's net backpay liability to Stevenson. I have chosen not to follow such an approach beyond the end of first quarter 1978 because I believe that doing so would improperly penalize Stevenson. It is evident from the record as a whole, including from Stevenson's testimony that Brown & Root employment was not likely to be continuous. Rather, it appears that Brown & Root (and other maintenance subcontractors) undergo regular increases and shrinkages in their maintenance employee complement depending on the needs of their industrial clients. It is therefore unlikely that Stevenson would have remained in Brown & Root's regular employ throughout the balance of the backpay period even if he had not been discharged. In the absence of more specific indications as to the likely length of Stevenson's employment with Brown & Root, I have simply chosen to presume that it would have continued for the balance of first quarter 1978, but would have ended at that point, believing it to have been Respondent's burden to have made a record warranting any other approach.

Recapitulating, using an alternative (nonpenalty) method of computation, quarterly net backpay for the backpay period would be as follows:

(total through 2d quarter 1977)	$5,085
3d quarter 1977	2,474
4th quarter 1977	3,488
1st quarter 1978	1,358
2d quarter 1978	2,103
3d quarter1978	588
4th quarter 1978	1,543
1st quarter 1979	428
2d quarter 1979	29
Total	$17,066

26. Kenneth A. Tadlock

The claim for Tadlock is $1,990. This figure reflects "special" claims for additional mileage and other expenses incurred in seeking or working at interim employers and for the cost of maintaining insurance coverage comparable to that provided by Respondent. Tadlock was regularly employed throughout the backpay period and earned more in each quarter (excluding the "special" claims) than if he had remained at Respondent. Respondent's special defense in the case of Tadlock is similar to its broad defense that the *Woolworth* formula is inappropriate. It points out that, taking the backpay period as a whole, Tadlock's gross interim earnings were substantially in excess of what the General Counsel calculates Re-

[92] Backpay period ends April 6, 1979, with offer of reinstatement.
[93] His sole explanation: "*Probably* 'cause of my car . . . a buddy of mine wrecked it . . ." (therefore leaving him without means of transportation to work). (Emphasis supplied.)
[94] See colloquy in transcript.

spondent's gross backpay liability to have been. Accordingly, argues Respondent, his $1,990 in claims for "special" costs and expenses should be borne by him alone out of the "excess" earnings he received in the backpay period.

I reject Respondent's defense. If the expenses were incurred, and I find that they were based on competent evidence introduced by the General Counsel, then they may be treated as offsets to his interim earnings in the quarter in which they were incurred under the standard *Woolworth* formula to which precedent binds me. Respondent owes Tadlock, exclusive of interest, $1,990.

27. Ricky D. Talent

The claim for Talent is $6,356, including $466 in proven costs of maintaining comparable insurance. Respondent argues that Talent's backpay rights should have been tolled when he quit a "substantially equivalent" interim job with Upjohn Co. in first quarter 1977 in favor of self-employment as a truck driver/lessor. I find and conclude as follows:

Talent quit his job at Upjohn on February 14, 1977. He was a master instrument technician at Upjohn and had held a similar title at Respondent. Apart from his desire to take a stab at self-employment by going into business leasing his truck, he states he wanted to leave Upjohn because it involved breathing hazardous chemicals. He acknowledged that there were dangers in working at Respondent, as well, but testified, and I find, that those dangers were not of the same type as the ones associated with breathing hazardous chemical vapors.[95] This was sufficient to show that the Upjohn job was different enough from his job with Respondent to permit his seeking of employment elsewhere without prejudice to his backpay rights. Nor was his choice to obtain interim earnings as a driver/lessor shown to have been so unreasonable as to amount to a willful forfeiture of interim earnings.

Moreover, I note that Talent pursued the driver/lessor employment for only 2 months before determining that it was an unprofitable venture. He thereafter returned to seeking and obtaining regular employment in his traditional trade and industry.

I therefore reject Respondent's defense and find that Respondent owes Talent, exclusive of interest, $6,356.

28. Johnny Kenneth Trojanowski

The claim for Trojanowski is $12,088. Respondent raised no special defenses as to his claim, and he is included in the "catch-all" category in Respondent's brief. I therefore find that Respondent owes Trojanowski, exclusive of interest, $12,088.

29. Michael Lee Vickery

The initial claim for Vickery was $2,736, including $600 in proven costs incurred in maintaining comparable insurance coverage. Respondent treats him on brief as being subject only to its broad, "catch-all" defenses. I therefore find that Respondent owes Vickery, exclusive of interest, $2,736.[96]

30. Fred L. Walker

The General Counsel concedes that Walker is not entitled to backpay. However, the specification alleged that he incurred unreimbursed medical expenses amounting to $1,078 for various medical expenses which would have been covered under Respondent's group insurance plan. Affirmative evidence (G.C. Exh. 3 (dd), pp. 1-11) supports this claim, which Respondent has not contested. Accordingly, Respondent owes Walker, exclusive of interest, $1,078.

31. Floyd G. Williams

The claim for Williams, affected in part by proven "additional mileage" and unreimbursed medical expenses incurred by him[97] is $7,117. Respondent raises two related specific defenses as to the claim for Williams. First, Respondent argues that Williams unreasonably chose to limit interim employment opportunities to those to which he could be referred through a building trades union (Insulators) hiring hall. I have already considered and rejected this broad defensive claim in the case of Aldridge, *supra*. I note further that Williams worked as a "traveller," accepting referral to jobs in a multistate geographical area and that this resulted in his being regularly employed at much higher hourly rates than Respondent paid throughout the backpay period with substantial backpay-offsetting effects on Respondent's gross backpay liability. Respondent did not show that Williams' choice to seek work in the building trades amounted to an unreasonable lowering of his sights and/or that he willfully declined more lucrative interim employment in the Houston area.

Second, Respondent claims that Williams' backpay should at least be tolled for the approximately 1-month period in first quarter 1979 during which he was unemployed after "voluntarily" leaving his construction job in Evansville, Indiana, with Insulation Services, Inc.

I find and conclude as follows: Williams had been working on the Evansville construction job for between 5 and 7 weeks when the local business agent put out the word that travelers would have to leave the job in order to make room in a reduced work force for eligible local tradesmen. Williams heeded the call and left the job. I note that Section 8(f)(4) permits this typical construction industry practice whereby employers and labor organizations make agreements which give employment priority to persons with industry experience who reside in the geographic area where the work covered by the agreement is being done. I note further that the process described by Williams whereby travelers are asked by a local busi-

[95] The dangers at Respondent had to do with the risk of explosions, not breathing chemical vapors.

[96] On brief, the General Counsel concedes in accordance with his agreement at the hearing, that the backpay specification for Vickery should be reworked to account for 4 days of work in third quarter 1976 for Oxirane Chemicals. (It having been shown that his Oxirane employment started 4 days before the end of that quarter, rather than at the beginning of fourth quarter, 1976, as alleged in the original specification. This reallocation does not affect the total net backpay owed.)

[97] Amounting to $865.

ness agent to move on to make room for local hires on a shrinking construction job is a traditional procedure by which agreements authorized by Section 8(f)(4) are implemented. In short, for Williams to have resisted the local business agent's request/instruction to leave the Evansville job would have been in defiance of internal trade union principles, as well as probably futile (assuming that there was an 8(f)(4)-type agreement which could have been enforced as to Williams if he had balked at the business agent's demand). It was therefore not unreasonable for Williams to honor the aforesaid tradition in the trade and it did not amount to a willful refusal to maintain interim employment for him to have left the Evansville job.

Neither was it unreasonable for Williams to have returned to the Texas City area where he maintained his home and where his family resided to renew his marital relationship for a brief period before again venturing out to a distant job in the trade. Respondent suggests that Williams could have sought work in Oklahoma or Oregon after being instructed to leave the Evansville job (Williams having admitted that the Evansville business agent had told him of available work in those locales when he instructed Williams to leave the Evansville job). But such sojourns back home are likewise an integral part of the life of a traveling construction employee. Having made what I have found to be a reasonable choice in entering that trade (considering his duty to mitigate Respondent's backpay liability), it follows that it was not unreasonable of Williams to have followed practices similar to those followed by other traveling construction workers in returning to home and hearth periodically. Moreover, Williams looked for work through the hiring hall in the area near his residence during that 1-month period in which he was out of work, but without success.

I therefore reject Respondent's defenses and sustain the backpay claim. Respondent owes Williams, exclusive of interest, $7,117.

32. Marvin J. Williams

The total claim for Williams is $28,931. Respondent claims that Williams turned down suitable employment shortly after his discharge by Respondent, that he thereafter took unsuitable work in Iran, and that (after taking several quarters' worth of suitable interim employment) he abandoned any serious intention of seeking comparable employment and went into a state of retirement (from start of third quarter 1978 through the end of the backpay period).

I find and conclude as follows: Williams is retired from the United States Air Force, where his specialty was as an aircraft mechanic. While in Respondent's employ, he was a millwright, earning $7.20 per hour at the time of his discharge.

In third quarter 1976 shortly after his discharge, he admittedly sought work as an aircraft mechanic with two Houston-area firms, Beech Aircraft and Metro Airlines. In each case, he turned down available jobs because he found them unsuitable—Beech, because it was low paying (about $5.10 per hour), there was a rotating shift schedule, and the sheet metal work entailed was out of his particular craft skill (turbine engines); Metro, because it was low paying ($5 per hour), and involved only night-shift work. Williams did not normally work nights while in Respondent's employ.

Respondent questions the sincerity of Williams' alleged reasons for turning down those Houston jobs, particularly because Williams shortly thereafter took a job with the Bell Helicopter Co. in Iran where he only earned a base rate of $3.50 per hour (admittedly with provisions for quarters allowances, but, as Williams further admitted, the quarters allowance was insufficient to offset his actual costs in securing quarters). He left the job with Bell in Iran in early first quarter 1977, believing that it was a money-losing proposition. His earnings for those 2 months of employment with Bell in Iran were nevertheless sufficient to virtually offset Respondent's backpay liability in first quarter 1977 (leaving net backpay of only $105).

He did not work in second quarter 1977. From start of third quarter 1977 through second quarter 1978, Williams worked in Saudi Arabia for Fluor Arabia, Ltd., and his earnings in those quarters were more than sufficient to offset Respondent's gross backpay liability.

After his completion of his contract with Fluor on June 18, 1978, Williams had no further earnings whatsoever in the remaining four quarters of the backpay period.

As to the period commencing from his discharge through second quarter 1978, I find that the General Counsel's backpay claims are correct. Respondent did not demonstrate that Williams turned down suitable available work. The jobs for Beech and Metro were not comparable from a wage or work shift standpoint with his job at Respondent. Moreover, he worked at interim jobs all but 1-1/2 quarters of that period, and virtually extinguished Respondent's backpay liability in all but one quarter in that period.

A more substantial doubt about whether or not he was actively seeking interim work in good faith is raised during the period start of third quarter 1978 through the balance of the backpay period. He testified that he made regular and widespread job searches during that roughly 1 year's time, but without success. He admitted initially that he had made several trips to the Philippines since 1977 where he has friends and where he can live cheaply. His testimony was that he generally spent only a few weeks at a time there, however. He admittedly has not owned or rented a residence in the Houston area for some time. When he is in the United States he stays with his daughter in League City near Houston. His daughter, Martha King, was called by Respondent to impeach Williams. She testified that, in recent years, Williams had typically been out of the country for more like 3 or 4 months at a time, including on trips to the Philippines.

Pressed on this point when he was recalled to the stand by me, and having located a reissued passport to refresh his recollection, he acknowledged that he was in transit to or from and/or residing in the Philippines from about February 9 through March 27, 1979 (i.e., within the backpay period). He testified that he was residing with his daughter in League City from about June 18, 1978, when he left Fluor, until February 9, 1979, when he departed for the Philippines. He further testified that he was regularly searching for work in the Houston area and in Mississippi (where he was visiting relatives) during the period June 18, 1978, to February 9, 1979. He also testified that he looked for work while in the Philippines in 1979, but found no suitable jobs because of the extremely low pay levels there.

I do not credit Williams that he has been engaged in any serious search for work since his return from the Fluor job in June 1978. It is clear that his initial attempts to downplay the extent of his visits to the Philippines was to avoid the inference that he had gone into a form of retirement. His lack of candor in that instance causes me to doubt his veracity as to alleged searches for work after June 18, 1978. At the very minimum, I would deny him backpay for the period that he was in the Philippines between February 9 through March 27, 1979. He was clearly out of the comparable labor market during that period and his protestations that he was seeking work in the Philippines while residing there is incredible in the light of his knowledge based on lengthy prior experience with job conditions there that one could not hope to earn anything near what one could earn in the United States. Beyond that period, however, the very fact that he left this country for about 6 weeks in 1979 within the backpay period renders doubtful his claim that he was seeking work in the Houston area in the periods before and after he made that trip. Likewise, the fact that he declined Respondent's April 6, 1979, offer of reinstatement (made only shortly after his return from his 6-week sojourn in the Philippines) suggests that he had taken himself out of the active labor market by or before that date. So, too, does the fact that he made another 4-month trip to the Philippines later in 1979, and after the close of the backpay period. Finally, so far as the record shows he was still unemployed even as of the time that the backpay hearing was conducted.[98]

Considering all of the foregoing, including his total failure to be employed after the Fluor job and my doubts of Williams' candor as a witness, I conclude that Williams voluntarily and willfully abandoned any serious interest in further regular employment when he completed the Fluor job on June 18, 1978. Accordingly, he is not entitled to backpay beyond that date.

Recapitulating, Williams is entitled to the net backpay claimed for him from the start of the backpay period through June 18, 1978. More specifically, he is entitled to net backpay of $2,022 for third quarter 1976, $4,943 for fourth quarter 1976, $105 for first quarter 1977, and $5,257 for second quarter 1977. In all other quarters up to the end of second quarter 1978, his interim earnings negated Respondent's backpay liability. His correct net backpay total in the period ending June 18, 1978, is therefore $12,327. Since his willful departure from the labor market after that date extinguishes any further liability on Respondent's part, Respondent owes Williams, exclusive of interest, $12,327.

33. Steve Wylie

The claim for Wylie is $34,735. Respondent claims that Wylie made no good-faith job searches in third quarter 1976 after his discharge. Respondent also claims that Wylie's lack of employment except as an equipment handler for a musical group between start of first quarter 1977 and early second quarter 1978 should be characterized as willful failure on his part to seek suitable interim employment. A similar question is raised by his return to his family home in Ohio after the musical group broke up where he thereafter obtained relatively insubstantial earnings doing seasonal (construction) work in an admittedly poor job market.

I find and conclude as follows: Wylie, employed by Respondent as a millwright-helper[99] at the hourly rate of $6.35 when he was unlawfully discharged, did not obtain employment in the balance of third quarter 1978. He admittedly did not register with TEC after his discharge by Respondent and further admittedly did not pursue hiring leads suggested to him by the Union's representative, L. Q. Black. One such suggested job was in cleaning boilers, which he ignored because he did not like the work. Although his specific duties as a millwright helper at Respondent are not a matter of record (other than that they involved machine repair), he acknowledged that boiler cleaning was part of the work performed by some maintenance employees at Respondent. Wylie returned pretrial questionnaires to the compliance officer (G.C. Exh. 3 (HH) 5–6) in which he made no entries in the spaces calling for descriptions of job searches he had made.

I believe the foregoing evidence clearly reflects a lack of proper diligence of Wylie's part in searching for work in balance of third quarter 1976 after his discharge. Noting further the previously cited testimony of TEC representative, Matcek, that there was a relative abundance of laborer, maintenance, and helper-type jobs during that period, I conclude that Wylie willfully avoided seeking work in that period. I do not credit Wylie's summary and unspecified claim that he "tried quite a few [potential employment sources]." I would, therefore, deny him backpay for third quarter 1976.

The fact that he worked fairly regularly for a variety of employers in fourth quarter 1976 and thereby reduced Respondent's net backpay obligation in that quarter to $1,515 satisifies me that Wylie did enter the employment market in good faith during that quarter. I would, therefore, sustain the net backpay claim of $1,515 in that quarter.

Beginning in first quarter 1977, however, he admittedly abandoned any search for work in areas relevant to his prior employment experience and took a $100-per-week job as an equipment handler with a band (fever) which was managed by a close friend and which trav-

[98] I am mindful that his conduct after the close of the backpay period does not have any dispositive significance to the question whether he had taken himself out of the labor market at some earlier point during the backpay period. Where, as here, however, there is evidence tending to show Williams' lack of serious interest in employment before the close of the backpay period, his later conduct tending to show the same lack of employment interest has some persuasive significance in shedding light on his earlier state of mind.

[99] Before working for Respondent, Wylie had some construction carpentry experience.

eled throughout Texas and two other States for the next 1-1/2 years, until the band broke up at the end of April 1978.[100] His earnings from this work were admittedly "considerably less" than those he had received from employment with Respondent (in fact, $900 per quarter as opposed to at least $3,500 per quarter which he had earned at Respondent) and, indeed, were substantially less than he had received while employed at a variety of jobs in fourth quarter 1976. Asked whether his choice to work for the band stemmed from a desire to prepare for a "change of . . . trade or . . . vocation," Wylie replied: "Not particularly. I was just doing something that I enjoyed doing."

I am satisfied that Wylie's pursuit of work with his friend's musical group reflected a willful choice to forgo greater earnings in favor of work which, while low paying, was more personally enjoyable. Respondent is not obliged to subsidize such ventures. I would therefore toll backpay during the period Wylie voluntarily absented himself from the comparable labor market by traveling with the "Fever" band.[101] Accordingly, Wylie is due no net backpay for the period start of first quarter 1977 through end of April 1978.

When the "Fever" band broke up, Wylie admittedly chose not to return to the Houston area. Instead, he returned to his parents' home in Port Clinton, Ohio. He states that he was partially influenced in this decision by a desire to be near his mother who had suffered a second heart attack. In the year's period thereafter, i.e., until the conclusion of the backpay period, he worked irregularly for a construction industry employer, Higgins Builders. His job there was (according to the above-cited pretrial questionnaire) as a "laborer." At the hearing, he testified that he worked as a "carpenter." Whatever his job title and function, he earned $5 an hour (according to his response in the questionnaire). By choosing to move to that northern climatic area and to seek work in the construction field, he admittedly reduced his chances of obtaining regular work, since, as he testified, very little construction work is possible outside of the spring and summer months.

I conclude that his return to Port Clinton, Ohio—an admittedly inferior labor market—was a personal choice to forgo substantially greater earnings available in the Houston area and therefore amounted to a willful failure to mitigate Respondent's gross backpay liability. Unlike the cases of Coryell and Fairless, *supra*, there is no evidence that Wylie originally left his home in Ohio solely to take a job with Respondent. Further unlike Coryell's and Fairless' choice to return to the "comparable" labor market in California, Wylie's choice to return to Ohio after the breakup of the "Fever" band was admittedly a choice to avoid greater earnings available in Houston.[102]

It might be argued that his mother's apparently frail health was a compelling reason requiring Wylie's return to Ohio. This would appear to be irrelevant from a backpay computation standpoint, however. Presumably, even had he never been wrongfully discharged by Respondent, he would have been compelled[103] by his mother's poor health to return to Ohio when he did. Applying the "hazards of living generally" approach in *American Manufacturing Company of Texas, supra*, Respondent should not be required to subsidize any diminution in earnings which Wylie suffered by being compelled to return to an inferior labor market in order to be near his family.

Having found that Wylie willfully avoided the likelihood of obtaining greater earnings by returning to Ohio, it follows that Respondent's backpay liability was further tolled for all periods after Wylie's move to Ohio. *Spoon Tile Company, supra.*

Recapitulating, Respondent's backpay liability to Wylie was tolled in all quarters of the backpay period in which Wylie willfully failed to engage in a good-faith search in comparable employment markets for employment in jobs comparable to those he performed for Respondent. I have found that this was the case in all but fourth quarter 1976, his net backpay for that quarter was $1,515. Respondent therefore owes him, exclusive of interest, $1,515.

IV. CONCLUDING DISCUSSION AND RECOMMENDED ORDER

I have concluded that the formulas used in the backpay specification to derive Respondent's gross backpay liability as to each discriminatee were reasonable and appropriate and that the mathematical calculations made based on those formulas were accurate. I have concluded that Respondent's proposed alternative formulas were unreasonable and would not provide a just measure of the backpay owed to the discriminatees under the Board's underlying Order and the Fifth Circuit's enforcing decree. I have determined that Respondent has sustained its burden of demonstrating that some discriminatees were not entitled to the amounts claimed for them by the General Counsel—principally because they failed in some or all portions of the backpay period to search for, accept, or retain comparable interim employment in comparable labor markets. I have concluded in other cases that Respondent failed to satisfy its burden of demonstrating that discriminatees violated their duty to mitigate Respondent's gross backpay liability.

Based on all of the foregoing, including the case-by-case analyses in the preceding section, and the entire record herein, I hereby issue the following recommended:

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[100] The backpay specification concedes that Wylie earned $400 in second quarter 1978 working with the "Fever" band. Since he admittedly earned $100 per week in that employment, I infer that the band broke up 4 weeks into second quarter 1978; i.e., at the end of April 1978.

[101] See, e.g., *Brotherhood of Painters, etc. (Spoon Title Company)*, 117 NLRB 1596 (1957), wherein the Board stated (*id.* at 1598, fn. 7):

> In determining the amount to be deducted from net backpay for willful loss of other earnings during the period of unlawful discharge the Board assumes that any other employment would have yielded earnings equal to that of the work from which the discriminatee had been discharged.

[102] Compare *M Restaurants, Inc., supra.*

[103] I do not decide whether Wylie was compelled from a subjective standpoint to return to Ohio because of his mother's poor health. If he were, then, as pointed out below, he would have been similarly compelled to leave Respondent's employ even if he had never been wrongfully discharged.

SUPPLEMENTAL ORDER[104]

The Respondent, Big Three Industrial Gas & Equipment Co., Houston, Texas, its officers, agents, successors, and assigns, shall:

1. Pay to each discriminatee the sum set opposite his name on the attached net backpay recapitulation marked "Appendix," together with interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977).

2. Pay to Richard Dickman, in addition, a backpay amount sufficient to make him whole for the difference between the hourly rates he received after his reinstatement in April 1979 and the rates he would have received had Respondent given him "service" credit for the period during which he was unlawfully discharged, together with interest on such amount as set forth above.

[104] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Appendix

Name	*Net Backpay (Recommended Order)*
Thurman T. Aldridge, Jr.	$13,985
Thomas M. Albright	11,461
James E. Bowlin	40,328
Jesse D. Burleson	5,077
Gary A. Carrico	3,318
John E. Coryell	11,150
Richard A. Dickman	4,126
James L. Ellis	23,031
William Fairless	10,936
Alan E. Fowler	9,523
Robert M. Fox	7,078
Kenneth Gatlin	13,826
Thomas W. Hurt	4,789
Lee T. Judd	10,849
Louren Lee Lamb	11,197
Daniel G. Leggett	21,241
Jesse Lopez	37,763
Richard McBride	16,301
Stephen Ray McKnight	12,707
Robert Molis	2,988
Robert Rhoades	21,299
Richard Michael Robb	10,582
Charles Rodriguez, Jr.	6,550
Talmadge F. Smith	4,202
Jeffrey D. Stevenson	5,360
Kenneth A. Tadlock	1,990
Ricky D. Talent	6,356
Johnny Kenneth Trojanowski	12,088
Michael Lee Vickery	2,736
Fred L. Walker	1,078
Floyd G. Williams	7,117
Marvin J. Williams	12,327
Steve Wylie	1,515